IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-6172

JIMMY LEE GRAY,

Petitioner

VERSUS

EDDIE LUCAS, Warden, and THE ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the lack of any requirement that the jury at petitioner's capital sentencing hearing find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that, therefore, death is the appropriate punishment violated the Eighth and Fourteenth Amendments?

2. Whether the Sixth Amendment imposes a greater duty upon counsel representing a person charged with a capital crime than upon an attorney representing someone charged with a non-capital offense to engage in thorough pre-trial preparation and investigation for the sentencing phase of a death penalty trial?

3. Whether the prosecution's surprise interjection of evidence of the petitioner's future dangerousness, which is not set forth as an aggravating circumstance in the Mississippi statute prescribing the limited aggravating circumstances that may be presented at a capital sentencing hearing, violated the Eighth and Fourteenth Amendments?

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Petitioner, Jimmy Lee Gray respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION TO OPINIONS BELOW:

The opinion of the Court of Appeals is reported at 677 F.2d 1086 (5th Cir. 1982), and is attached as Appendix A. The order of the court denying rehearing is reported at 685 F.2d 139 (5th Cir. 1982) and is attached as Appendix B.

JURISDICTION:

The opinion of the Court of Appeals was rendered on June 10, 1982. The order of the Court of Appeals denying a timely petition for rehearing and for rehearing en banc was rendered on September 3, 1982. On November 23, 1982, Justice White entered an order extending the time for filing a petition for writ of certiorari to and including January 31, 1983.* Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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* Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence.

the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the Mississippi Code; Section 97-3-19; Section 97-3-21; Section 99-19-103; and Section 99-19-105. These statutory provisions are attached as Appendix D.

STATEMENT OF THE CASE

A. Course of Proceedings

The petitioner, Jimmy Lee Gray, was charged in Jackson County, Mississippi, with the murder of Deressa Jean Scales, a three-year old child, during the commission of a kidnapping. He was convicted of capital murder and a death sentence was imposed on December 15, 1976. The conviction and sentence were reversed on November 16, 1977, and the case was remanded for a new trial. Gray v. State of Mississippi, 351 So.2d 1342 (Miss. 1977).

After a two-day trial, the petitioner was again convicted of capital murder and sentenced to death on April 26, 1978. On September 26, 1979, the Supreme Court of Mississippi affirmed the petitioner's conviction and death sentence. Gray v. State of Mississippi, 375 So.2d 994 (Miss. 1979). This Court denied a petition for writ of certiorari on June 2, 1980, Gray v. State of Mississippi, 446 U.S. 988 (1980), and rehearing was denied on August 11, 1980. 448 U.S. 912 (1980).

Prior to the denial of rehearing, the Supreme Court of Mississippi set petitioner's execution for August 6, 1980. The petitioner filed an application in the Supreme Court of Mississippi for leave to file a petition for writ of error coram nobis; this application was summarily denied on August 4, 1980. On the same date, the petitioner filed his petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi and sought a stay of execution. The basis of federal jurisdiction in the federal district court was 28 U.S.C. §2254. See also, 28 U.S.C. §2241. The district court granted a stay and on October 17, 1980, an evidentiary hearing was conducted on several of the allegations in the petition. On November 26, 1980,the petition was dismissed by the district court.

The district court judgment was affirmed on June 10, 1982, by a panel of the United States Court of Appeals for the Fifth Circuit. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982). On September 3, 1982, the petition for rehearing and for rehearing en banc was denied. Gray v. Lucas, 685 F.2d 139 (5th Cir. 1982).

B. Facts Material To Questions Presented

About three weeks prior to petitioner's second trial, two attorneys from Pascagoula, Mississippi, were appointed to represent the petitioner, Jimmy Lee Gray. Gray v. Lucas, supra, 667 F.2d at 1090. After their appointment, these attorneys interviewed the petitioner and were apprised of certain information: (1) he had been incarcerated in the Arizona State Prison from March 1968 until approximately sixteen months prior to his arrest in Mississippi (June 1976) for the murder of Deressa Jean Scales*

* Petitioner had previously been convicted of second-degree murder in Arizona. The circumstances of the offense, as described in the Arizona prison file which was introduced into evidence in the district court, are as follows: the petitioner, who was about nineteen at the time, and his girlfriend, who was almost seventeen, had an argument over a girl to whom petitioner had written. A struggle erupted between the two of them, and the petitioner's girlfriend was killed.

[E.H. 71-72];* and (2) he had been regularly communicating with several people since the time of his arrest in Mississippi; [E.H. 121]. Counsel did not interview any of the potential witnesses in mitigation of punishment whose names came to their attention during their meetings with the petitioner nor did they conduct an independent investigation into his activities during his recent confinement in Arizona.** Rather, counsel decided, without any investigation of essential background information about the petitioner, to pursue a mentally disturbed defense at sentencing.

When counsel discussed this defense with a local psychiatrist, he advised them that he could not be of any assistance and that the nine-year-old results of petitioner's Minnesota Multiphasic Inventory (MMPI), which counsel planned to introduce at sentencing, were "pretty archaic." [E.H. 66, 115].

At the sentencing hearing, counsel did not present any mitigating witnesses who could testify about petitioner's background or life history. Nor did counsel present any defense testimony relating to the mitigating factor of mental disturbance. Instead, they introduced the MMPI results, without any explanatory or foundational testimony, and rested. Counsel also stipulated to the admissibility of the rebuttal testimony of a state psychologist, Dr. Charlton Stanley, who had previously examined the petitioner for competency and sanity. Although they had never interviewed Dr. Stanley or discussed his proposed testimony [E.H. 63], counsel "wasn't surprised" by Stanley's testimony at sentencing [E.H. 107]. This testimony advised the jurors that (1) the petitioner did not exhibit any sign of mental disorder during his interviews with Stanley

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*E.H. refers to the transcript of the evidentiary hearing in the United States District Court for the Southern District of Mississippi on several of the allegations in the petition for writ of habeas corpus.

**The record indicates that neither counsel ever recalled being advised by the petitioner not to contact individuals, other than petitioner's family and former girlfriend in Pascagoula, who could provide information about his character and background. [E.H. 116-117;120;123].

[TR.* 600, 604, 606], a conclusion that was in direct conflict with the defense they had sought to present; (2) the MMPI results should be taken "with a grain of salt" [TR. 608], which discredited the sole piece of evidence proffered by the defense; (3) petitioner represented a future danger to society [TR. 604, 605, 606], which is a nonstatutory aggravating circumstance under Mississippi law; and (4) the MMPI results were consistent with his prognosis of petitioner's future dangerousness [TR. 610], which established for the jurors that counsels' sole piece of evidence provided adequate justification for a death sentence.

In point of fact, had counsel conducted an independent investigation they could have presented a substantial amount of evidence on the critical jury issue of whether petitioner should live or die. At the habeas hearing, petitioner presented information from mitigation witnesses that would have established significant factors in mitigation of sentence: (1) statements from computer programming specialists for the State of Arizona and private corporations [E.H. 170-176]** who described the pioneer work that the petitioner had done in developing a computer training program at the Arizona State Prison, his excellent adjustment to prison life, and their unanimous view that, if sentenced to life imprisonment, he could exist in a prison environment without posing any danger; (2) evidence from people who had known petitioner*** that he felt deep remorse,

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* TR. refers to the transcript of the proceedings at the petitioner's second trial in the state courts of Mississippi in April 1978.

** These witnesses were Richard Van Allen, a Project Manager for the State of Arizona Department of Administration Data Center; Bill Gerrish, a computer education specialist for Honeywell Information Systems, Inc. in Phoenix, Arizona and the former teacher of a computer training program at the Arizona State Prison that was sponsored by Honeywell in conjunction with the State of Arizona; and David Tuttle, an employee of the Data Center of the Department of Administration of the State of Arizona.

*** These witnesses were Reverend Donna Spence, Lillian Spears, and Reverend Randol Goodrich. Reverend Spence is a minister and long-time resident of Pascagoula. She was the outstanding citizen of the year for Jackson County in 1977 and has been the receptionist of numerous awards for her volunteer work with adult and juvenile offenders. Her status in the local community would most assuredly have influenced the jury's assessment of the appropriate sentence for petitioner. Lillian Spears is a retired resident of Lawton, Oklahoma, who corresponded with the petitioner but had never met him. The petitioner had shared a significant amount of his creative writing and other information about his past with her, so she was familiar with influential events in her background. Reverend Goodrich is the pastor of a church in Huxley, Iowa, and functioned as a spiritual advisor for the petitioner.

had undergone significant spiritual growth, and could make a positive contribution to society if he were sentenced to life imprisonment [E.H. 161, 182, 184,185; R.*86-87]; and (3) evidence of mistreatment as a child, of childhood experiences that had left a deep psychological scar on the petitioner, and of petitioner's sincere efforts to seek help for the psychological turmoil occasioned by this tragic histroy [E.H. 163-64; R. 87]. This evidence, which was never heard or considered by the jurors assessing the petitioner's fate, was relevant and essential for a reliable determination of whether the petitioner should be sentenced to life or death.

At the sentencing hearing, the state trial judge never advised the jurors that they had to determine beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances and that, therefore, death was the appropriate punishment.** Thus, neither the provisions of the Mississippi Code, nor the instructions to the jury at the close of the sentencing phase of petitioner's trial [TR.625-30], required the jurors to find beyond a reasonable doubt that death was the proper punishment for the petitioner.

The court of appeals concluded that the petitioner was not deprived of the effective assistance of counsel even though his attorneys failed to interview numerous accessible witnesses in mitigation of punishment, Gray v. Lucas, supra, 677 F.2d 1091-95, and to interview the state psychologist whom they stipulated could testify at the sentencing hearing. Id. at 1095-96. Nor did the court of appeals find any constitutional flaw in the prosecutor's surprise interjection of the idea of future dangerousness into a capital sentencing hearing when this factor was not even a statutory aggravating circumstance in Mississippi. Id. Finally, the court of appeals concluded that the lack of any requirement in Mississippi law that the jury find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before it could impose the death penalty did not violate the Constitution. Id. at 1107; 685 F.2d at 140-41.

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* "R" refers to the record on appeal in the court of appeals.

** While defense counsel did not object to the lack of a reasonable doubt instruction, the State has never interposed a Wainwright v. Sykes, 433 U.S.72(1977) bar to the consideration of this issue, and the court of appeals considered the question on its merits. See Estelle v. Smith, 451 U.S. 454, 468 n. 12(1981).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT THE REASONABLE DOUBT STANDARD BE APPLIED IN DETERMINING WHETHER A DEATH SENTENCE IS THE APPROPRIATE PUNISHMENT IN A PARTICULAR CASE

This Court should grant certiorari in order to resolve the important constitutional question of whether a person can be deprived of his life in a capital sentencing proceeding without requiring the jurors to determine beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that, therefore, death is the appropriate punishment. While the question presented has never been previously decided by the Court in its decisions articulating the procedural and substantive requirements of a constitutionally acceptable death penalty scheme, the prior decisions of this Court point ineluctably to the constitutional imperative of a reasonable doubt standard before the death penalty can be imposed.

Furthermore, the definitive determination of this critical issue will ensure that a consistent and reliable burden of proof is uniformly followed throughout the country. In contrast, the present uncertainty surrounding this issue has led to an inconsistent pattern of differing state burdens.* While different procedural requirements or capital sentencing schemes might be tolerable under the Constitution in certain circumstances, it is difficult to imagine a requirement where the reasons for national uniformity are more compelling than the burden of proof governing the determination of whether an individual should live or die.

A. The Court has already recognized that proof beyond a reasonable doubt is among the fundamental requirements of due process and fair treatment in a criminal trial. In re Winship, 397 U.S.

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* Petitioner is aware of at least seven states that presently require the reasonable doubt standard by statute, court rule, or pattern jury instruction: Arkansas, Ark. Stat. Ann. sec. 41-1302(2)(1977); Alabama, Edwards v. State, ___ So. 2d ___ (Ala. Crim. App. 1982); Missouri, Bullington v. Missouri, 451 U.S. 430, 434 (1981) (pattern jury instructions); North Carolina, N.C.G.S. sec. 15A-2000(c)(2)(3); Ohio, Ohio Rev. Code Ann. sec. 2929.03(D)(1)(1982); Utah, State v. Wood, 648 P.2d 71, 83-84(Utah 1982); Washington, Wash. Rev. Code sec. 10.95.060(4). To petitioner's knowledge, the rest of the states do not apply the reasonable doubt standard to the ultimate sentencing decision or else, like Mississippi, apply a standard of proof that is tantamount to the preponderance of evidence standard.

358, 363 (1970). Indeed, the absence of the reasonable doubt standard "substantially impairs the truth-finding function" of a criminal proceeding. Ivan V. v. City of New York, 407 U.S. 203, 205 (1972). While the question of whether the Due Process Clause or the Eighth Amendment requires that the factfinder at a capital sentencing proceeding be convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances has been unresolved in any prior capital punishment decisions of the Court*, the logical force of this Court's prior decisions inexorably leads to an affirmative answer.

The constitutional reasons compelling a reasonable doubt standard flow from several discrete principles established by this Court. First, the sentencing process in a death case is qualitatively different from the traditional sentencing process. Lockett v. Ohio, 438 U.S. 602, 604(1978); Gardner v. Florida, 430 U.S. 349, 357 (1977); Woodson v. North Carolina, 428 U.S. 280, 305(1976). The difference between death and other penalties requires "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra, 428 U.S. at 305. See also, Lockett v. Ohio, supra, 438 U.S. at 604, and Beck v. Alabama, 447 U.S. 623, 637-38(1980). Thus, Mississippi, like most states in this country, has adopted special procedures for the sentencing determination in a capital case. Among these procedures is a separate sentencing hearing at which the jury is required to consider the presence or absence of specified aggravating circumstances and of mitigating circumstances relating to the crime and the defendant.

Second, this Court has recognized that the procedural pro-

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* The original opinion of the court of appeals suggests that the lack of a reasonable doubt standard "accords with the capital sentencing procedures which the Court has upheld as facially valid," citing Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976). Gray v. Lucas, supra, 677 F.2d at 1077. However, a careful review of the decisions cited by the court of appeals reveals that this Court did not address the specific issue of what burden of proof is required for the imposition of the death penalty under the Eighth and Fourteenth Amendments.

protections incorporated into capital sentencing schemes have resulted in a proceeding that "resemble[s], and, indeed, in all respects [is] like the immediately preceding trial on guilt and innocence." Bullington v. Missouri, 451 U.S. 430, 438 (1981). Bullington further recognizes that the sentencing phase of a modern capital case is a precisely defined trial on the issue of punishment. As in the Missouri trial described in Bullington, during the sentencing phase of a capital case in Misissippi, the jury is expressly required by state statute to make "specific written findings of fact"based upon the aggravating and mitigating circumstances in the statute and to determine whether the aggravating factors outweigh those in mitigation. Miss. Code Ann. sec. 99-19-101(3). The resemblance to the guilt-innocence phase is therefore as striking in Mississippi as it was in Missouri.

The third principle in this Court's prior decisions that is relevant to the question presented is the recognition that the reasonable doubt standard is a critical procedural safeguard, for it impresses upon the factfinder the strong "necessity of reaching a subjective state of certitude of the facts in issue." In re Winship, supra, 397 U.S. at 364. This standard, in effect, serves to ensure that because of the substantial value our society places on an individual's life or liberty, decisions affecting those interests will be governed by a standard that minimizes the risk of error, whim, passion or prejudice and that maximizes the reliability of the ultimate determination. In other words, in these areas "our society imposes alsmost the entire risk of error upon itself." Id. at 423.

The above decisions reveal the need for a grant of certiorari in the present case to resolve the question presented. If our Constitution does not allow the deprivation of liberty until a reasonable doubt of guilt is excluded, then it stands to reason

that a person's life should not be taken without a determination that the aggravating circumstances outweigh the mitigating circumstances and that death is the proper punishment. After all, there is no more significant act that our government can engage in than the irreversible deprivation of life; and the reasonable doubt standard is the only burden of proof that adequately preserves "the fundamental respect for life underlying the Eighth Amendment." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).*

Furthermore, since Mississippi has enacted a capital punishment scheme that is no different than a trial on the issue of guilt or innocence, Bullington v. Missouri, supra, there is no credible constitutional basis for applying the reasonable doubt standard to the ultimate determination at the latter proceeding and not at the former. Consequently, the principles derived from this Court's prior decisions establish the compelling constitutional reasons for the application of the reasonable doubt standard to the jury's determination of whether death is the appropriate punishment in a particular case.

B. The court of appeals failed to recognize the compulsion of these constitutional principles in concluding that "[t]he reasonable doubt standard simply has no application to the weighing of aggravating and mitigating factors." Gray v. Lucas, supra, 685 F.2d at 141 (on rehearing). This determination was predicated on the assumption that the relative weight of the aggravating and mitigating circumstances "is not susceptible of proof by either party," Gray v. Lucas, supra, 685 F.2d at 140, quoting from Ford v. Strickland, 676 F.2d 434, 442 (11th Cir. 1982), aff'd in a divided opinion, ___F.2d ___(11th Cir. 1983) (en banc).

The court of appeals' reasoning suffers from two basic flaws in constitutional analysis. First, the court failed to separate the inquiry into whether any standard of proof is required from the question of which standard is applicable

* Certainly, the preponderance of evidence standard, which is inherent in a determination of whether the aggravating circumstances outweigh the mitigating circumstances at a Mississippi sentencing hearing is constitutionally unacceptable under the Eighth and Fourteenth Amendments.

at the sentencing phase of a capital case. Yet, this Court has repeatedly explained that the inquiry into whether a standard of proof is appropriate in a particular situation is invariably a function of the level of confidence a factfinder should have in the ultimate determination, Addington v. Texas, 441 U.S. 418, 423 (1979); Santosky v. Kramer, __U.S.__, 102 S. Ct. 1388, 1395 (1982), not the nature of the finding or its susceptibility to proof by either party. Indeed, this Court has required that a standard of proof be applied in other situations that involved the weighing of factual matters or the exercise of a large measure of judgment in the evaluation of these facts. See, e.g. Santosky v. Kramer, supra; Addington v. Texas, supra. Thus, for the purposes of resolving the initial inquiry--whether any standard of proof is applicable to a particular determination--there is no proper constitutional basis for assuming that the issues adjudicated by the factfinder at a capital sentencing hearing are not susceptible to a standard of proof while concluding that those issues considered in a civil commitment or parental termination hearing are.

Having confused the inquiries, the court of appeals lapsed into a second error in constitutional analysis by failing to recognize that the requisite standard of proof should be the reasonable doubt standard. Indeed, since this Court has already concluded that a capital sentencing hearing is virtually identical to the preceding trial on the issue of guilt or innocence, Bullington v. Missouri, supra, the reasonable doubt standard is crucial to the constitutionality of the determination that death is the appropriate punishment in a particular case. Moreover, the court of appeals also lost sight of the central reason why the reasonable doubt standard is constitutionally compelled: "When the State brings a criminal action to deny a defendant life or liberty, 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional require-

ment they have been protected by""the reasonable doubt standard. Santosky v. Kramer, supra, 102 S.Ct. at 1395, quoting in part from Addington v. Texas, supra, 441 U.S. at 422-23. See also, Bullington v. Missouri, supra, 451 U.S. at 441. In the words of one state court, which echo the principles repeatedly pronounced by this Court:

> [The reasonable doubt standard] which is only used when the most basic interests of the individual are at stake, also conveys to a decisionmaker a sense of the solemnity of the task and the necessity for a high degree of certitude, given the nature of the values to be weighed, in imposing the death sentence.

State v. Wood, supra, 648 P.2d at 84.

Finally, there is no practical impediment to the imposition of the reasonable doubt standard, as evidenced by the use of this standard in at least seven states without any apparent difficulty.

C. In sum, this Court should grant certiorari to determine whether the reasonable doubt standard should be applied to the ultimate sentencing decision in a capital case. The present state of confusion over this issue has left the states to divine this Court's view of the propriety of this standard from allusions in other opinions when an explicit directive from the Court is needed. Moreover, all of the substantial procedural protections established by this Court for the sentencing phase of a capital trial could be undermined if the sentencing body is permitted to impose the death penalty in the face of a reasonable doubt as to the appropriateness of that penalty. Furthermore, the court of appeals' conclusion that this standard is inapplicable is neither supported nor justified by prior decisions of this Court. Rather, the principal reasons underlying the reasonable doubt standard, In re Winship, supra, 397 U.S. at 363-64, are implicated to a greater extent in a decision to deprive an individual of his life than they are in any other area of the law. The conflict between the reasoning of the court of appeals and prior

decisions of this Court, the fundamental importance of the question presented to the proper administration of the death penalty in this country, and the obvious need to ensure that the present standard, which approximates the preponderance of evidence standard, is not employed when matters of life or death are at stake, provide significant reasons for the grant of certiorari to review the judgment of the court of appeals.

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SCOPE AND NATURE OF COUNSEL'S DUTY UNDER THE SIXTH AMENDMENT TO INVESTIGATE AND PREPARE IN A CAPITAL CASE IS GREATER THAN IN A NON-CAPITAL CASE

The court of appeals held that attorneys in a capital case should not be governed by a higher standard than in a non-capital case. Gray v. Lucas, supra, 677 F.2d at 1092.* Certiorari is appropriate because the conclusion of the court of appeals conflicts with prior decisions of this Court and because the resolution of the question presented is of fundamental importance to the administration of the criminal justice system and the death penalty in this country.

A. This Court's prior decisions provide strong indications that a higher standard under the Sixth Amendment is required in capital cases. This conclusion is derived from two separate lines of cases. First, this Court has repeatedly noted that, for purposes of constitutional analysis, the penalty of death is different from all other lesser punishments. See, e.g., Woodson v. North Carolina, supra; Gardner v. Florida, supra. There is no reason why this principle is any less compelling when the Sixth Amendment right to effective assistance of counsel is involved** than when the Eighth, Woodson v. North Carolina, supra, or the Fourteenth Amendments,

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* The Fifth Circuit has consistently maintained this position. Washington v. Watkins, 655 F.2d 1346, 1356-57 (5th Cir. 1981); Washington v. Strickland, 693 F.2d 1243, 1250 n.12 (5th Cir. Unit B 1982) (en banc).

** The requirement of effective assistance of counsel is a corollary of the Sixth Amendment right to counsel. McMann v. Richardson, 397 U.S. 759, 771 (1970).

Gardner v. Florida, supra; Beck v. Alabama, supra, are implicated.

Second, this Court has emphasized that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, supra, 430 U.S. at 357-58. Yet, the administration of the death penalty will always appear to be arbitrary and capricious so long as there is a lack of uniformity in the minimal investigative responsibilities and obligations of counsel in a capital case. Indeed, an ineffective lawyer, as much as an ill-conceived state procedural requirement, could "diminish the reliability of the sentencing determination" in a capital case. Beck v. Alabama, supra, 447 U.S at 637.

Furthermore, this Court's decisions after Furman v. Georgia, 408 U.S. 238 (1972) also provide guidelines for the nature and scope of counsel's obligation to investigate and prepare for a capital case. These decisions have emphasized the need for a procedure in a capital case that allows the sentencer to consider the full range of the character and personal history of the defendant in making the critical sentencing determination. Thus, counsel's duties to investigate and prepare must be viewed in light of the requirement that "in capital cases, the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death." Woodson v. North Carolina, supra, 428 U.S. at 304; Lockett v. Ohio, 438 U.S. 586, 604 (1978). Consequently, in the context of a capital case, when the sentencer's access to a wide range of information about the defendant is essential for a reliable decision, counsel should be required to make an independent search for witnesses with knowledge of the

defendant's character, background, personal history and other statutory or nonstatutory mitigating circumstances. Only then can there be any assurance that all potentially mitigating factors in a particular defendant's character and background have been explored and developed. Only then is counsel in the position to make an informed assessment of the options available to his client and to evaluate the client's position for the sentencing hearing. By holding counsel to this duty to conduct a thorough investigation for information in mitigation of sentence, this Court will not be forcing counsel to present all of this evidence, for tactical or strategic considerations peculiar to a particular case might dictate the extent to which counsel presents this information to the sentencer. However, the Court would be able to enhance the reliability of the capital sentencing process by ensuring that all counsel representing defendants charged with capital crimes develop a reasonable information base, one that is consistent with the requisites of a constitutional capital sentencing system, from which the sound exercise of professional judgment can occur.

B. The court of appeals' Sixth Amendment analysis in the present case rests on several dubious principles that conflict with the tenor of this Court's pronouncements in the capital punishment area. First, the court of appeals indicates that the scope of counsel's independent duty to investigate a client's character and personal history is limited by the client's failure to specify certain witnesses as crucial.* Gray v. Lucas, supra, 677 F.2d at 1094. This principle severely limits counsel's duty to explore and develop all available information for the crucial sentencing decision in a capital case and clashes with this Court's

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* As noted on page 4, the record reflects that the petitioner imposed only modest limitations on counsel's investigation. Counsel was aware that petitioner had previously been incarcerated and was in regular communication with a number of people, but simply failed to investigate this mitigating information.

concern that a determination to impose the death penalty be reached in an informed and reliable fashion. To fulfill these goals, the duty to investigate in a capital case cannot be limited by a client's refusal or inability to provide information. Instead, counsel should be obligated to conduct an independent investigation or else "the fundamental respect for humanity underlying the Eighth Amendment," Woodson v. North Carolina, supra, 428 U.S. 304 will be wholly undermined by an uninformed or uneducated lay client.

Second, the court of appeals links the scope of the duty to investigate to "eyewitnesses to the crime" or other witnesses whom the defendant has characterized as "crucial". Gray v. Lucas, supra, 677 F.2d at 1094. By assuming that mitigation and character witnesses are not crucial to a reliable determination of who shall live or die, the analysis sharply conflicts with prior decisions of this Court. See, e.g., Lockett v. Ohio, supra; Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, supra. Counsel's responsibilities cannot be divorced so casually from the distinctive nature and purpose of capital sentencing proceedings, which require that the sentencer consider the character and personal history of the defendant to ensure a reliable decision on the appropriate sentence. Eddings v. Oklahoma, ____U.S.____, 102 S.Ct. 869, 875 (1982). Investigation of mitigating witnesses with information about the character or life history of the defendant is not a marginal responsibility of counsel as the panel intimates; it is essential for a constitutionally valid decision "on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, supra, 428 U.S. at 271.

Third, the court of appeals' analysis indicates that an informed decision as to strategy can precede, and even negate, counsel's responsibility to conduct an independent and thorough investigation into mitigating information. However, if a reliable sentencing determination in a capital case cannot be

reached without full consideration of the defendant's character and personal history, it is difficult to understand how counsel's purported strategy can be anymore reliable or informed in a capital case without the necessary information about his client.

Finally, the court of appeals established a test of prejudice for assessing counsel's failure to investigate in a capital case that is inconsistent with this Court's prior decisions. The court requires the petitioner to shoulder the impossible burden of showing that "knowledge of the uninvestigated evidence would have altered his counsel's decision." Gray v. Lucas, supra, 677 F.2d at 1093. Yet, this Court has indicated that the test for determining prejudice arising from violations of the Sixth Amendment should focus on whether the fairness of the "adversary criminal process" was affected, United States v. Morrison, 449 U.S. 361, 363 (1981). This is an objective standard and not dependent, as is the court of appeals' test, upon hindsight evaluation of the subjective decision-making processes of counsel. Moreover, in a capital case, the affect on the adversary process is directly related to the impact of counsel's failure to investigate upon the reliability of a death determination.

The court of appeals not only failed to adopt a test of prejudice that is consistent with this Court's decisions but also its conclusion is in conflict with the en banc decision of Unit B of the Fifth Circuit (now the Eleventh Circuit) in Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982). In Washington the court of appeals enunciated a test of "actual and substantial prejudice" in ineffective assistance of counsel cases, id. at 1262. This objective test is in direct conflict with the subjective test articulated in the present case. The need to resolve this conflict provides an independent reason for the grant of certiorari.

Becau e the court of appeals proceeded from principles that conflict with the tenor of this Court's decisions, it reached an erroneous conclusion that counsel provided effective assistance in petitioner's case. However, the record reveals that counsel failed to conduct the type of independent investigation that is constitutionally indispensable to a reliable determination of strategy in a death case. As a consequence, counsel were unaware of a range of powerful mitigating facts about their client's background that provided a forceful basis for a sentence of life imprisonment. Furthermore, counsel never even interviewed the sole witness at the sentencing phase, Dr. Charlton Stanley, even though they stipulated to his testimony. Although one of the attorneys testified at the evidentiary hearing that he "wasn't surprised" [R.H. 107] by the testimony of Dr. Stanley relating to the nonstatutory aggravating circumstance of petitioner's future dangerousness, and yet took no steps to prevent the devastating impact of the testimony from coming to the jury's attention, the court of appeals failed to find fault with counsels' performance. Gray v. Lucas, supra, 677 F.2d at 1095-96. Rather, the court resolved this issue by ignoring counsel's testimony and, instead, "finding" from a barren record that the prosecutor had interjected the idea of future dangerousness into the sentencing proceeding. id.* Consequently, the court of appeals sharply departed from the tenets and principles that underlie this Court's capital sentencing decisions in concluding that the petitioner was not deprived of the effective assistance of counsel.

C. In light of the above, a grant of certiorari is appropriate to resolve a question which is essential to the

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* As we will demonstrate in Section III, if the court of appeals' analysis is followed, then the petitioner was deprived of his rights under the Eighth and Fourteenth Amendments by the surprise interjection of the nonstatutory aggravating circumstance of future dangerousness into the capital sentencing hearing.

fair administration of the death penalty in this country. While this Court has described in several decisions the nature and extent of many of the procedural protections required for a constitutional capital sentencing scheme, it has never articulated the obligations of counsel representing a defendant charged with a capital crime. The lack of clarification of the responsibilities of counsel creates a severe problem in the trial of capital cases, since most persons charged with capital crimes are indigent and must rely entirely on court-appointed counsel. Furthermore, as the above discussion illustrates, there is a conflict between the Fifth Circuit and the present Eleventh Circuit, Washington v. Strickland, supra, on the manner in which the prejudice arising from a claim of ineffective assistance of counsel in a capital sentencing hearing should be assessed. In these circumstances, it is essential that this Court provide a set of uniform standards for counsel's investigation and preparation or else the procedureal protections established for persons facing the irreversible penalty of death will be nullified by attorneys who are inattentive, indifferent, or simply unaware of the scope of their responsibilities.

III. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE PROSECUTION'S SURPRISE INTERJECTION AT SENTENCING OF THE NON-STATUTORY AGGRAVATING CIRCUMSTANCE OF PETITIONER'S FUTURE DANGEROUSNESS VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENT

As noted above, the court of appeals resolved the claim of ineffective assistance of counsel for failing to interview the state psychologist, Dr. Charlton Stanley, by "finding" that the prosecutor, not Stanley, interjected the idea of future dangerousness into the sentencing hearing on three occasions. Gray v. Lucas, supra, 677 F.2d at 1095-96. In his petition for rehearing, the petitioner pointed out that the court of appeals had "resolved this claim in a manner that conflicts with the Eighth and Fourteenth Amendment," by sanctioningthe surprise interjection of nonstatutory aggravating circumstances into a capital sentencing hearing. [Pet. for Reh. at 7-8]; however, the court of appeals refused to reconsider its analysis of this issue. Gray v. Lucas, supra, 685 F.2d at 141.

The question of the propriety of basing a death sentence on evidence of nonstatutory aggravating circumstances is related to an issue presently pending before the Court in Barclay v. Florida, No. 81-6908, cert. granted, ____U.S.____ (November 8, 1982). There are at least two other reasons why a grant of certiorari is appropriate: (1) the court of appeals' implicit conclusion that there is no constitutional impediment to the prosecutor's surprise interjection of the idea of future dangerousness into a sentencing proceeding conflicts with prior decisions of this Court; and (2) the court of appeals' decision is in conflict with the decision of the only other court of appeal that has considered this issue of fundamental importance to the fair administration of capital sentencing schemes in the State and federal courts.

First, the State's introduction of evidence of non-statutory aggravating circumstances at the sentencing proceeding

is squarely at odds with prior decisions of this Court. Starting with Furman v. Georgia, 408 U.S. 238 (1972), this Court has repeatedly sought to ensure that jury discretion in capital sentencing be sufficiently guided so as to avoid the arbitrary and selective imposition of the death penalty. See, e.g., Beck v. Alabama, 447 U.S. 625 (1980); Godfrey v. Georgia, 446 U.S. 420 (1980). However, the State's elicitation of evidence of petitioner's future dangerousness, which is not one of the aggravating circumstances that a jury is limited to considering under Mississippi Law, Miss. Code Ann. sec. 99-19-101(5), injects a wholly extraneous factor into the capital sentencing calculus in violation of this Court's pronouncements. Allowing evidence of such a nonstatutory aggravating factor completely eviscerates the effect of the Court's mandate that the death penalty can be imposed only under statutory schemes that limit the sentencer's discretion "by requiring examination of specific factors that argue in favor of or against imposition of the death penalty." Proffitt v. Florida, supra, 428 U.S. at 258; Gregg v. Georgia, supra, 428 U.S. at 189-93. Instead, it returns capital sentencing to the pre-Furman days of discretionary capital sentencing, unchanneled by legislatively defined criteria, in violation of the Eighth Amendment.

Furthermore, evidence of future dangerousness is particularly likely to increase the chances of an arbitrary and unreliable death determination when such a factor is not explicitly prescribed by the legislature. As this Court has recently recognized, "some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliabilit.'" Estelle v. Smith, 451 U.S. 454, 472 (1981). The sentencing jury in a capital case in Mississippi is not required to determine whether the defendant represents a future danger or is likely to commit future violence, and expert forecasts on the issue necessarily divert

the jury's attention from its critical constitutional task of assessing the aggravating and mitigating circumstances set forth in Miss. Code Ann. 99-19-101,(5) and (6). Therefore, this type of nonstatutory aggravating evidence, more than any other nonstatutory factor, "introduces a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." Beck v. Alabama, supra, 447 U.S. 625.

Second, the decision of the Fifth Circuit conflicts with two decisions of the Eleventh Circuit, the only other court of appeals that has considered the question of the admissibility of evidence of nonstatutory aggravating circumstances. Proffitt v. Wainwright, 685 F.2d 1227, 1266-1269 (11th Cir. 1982); Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated on other grounds, ____U.S.____, 102 S.Ct. 2922 (1982), judgment reinstated on remand, 661 F.2d 311 (11th Cir. 1982). In Henry the court of appeals held that allowing evidence of nonstatutory aggravating circumstances to be placed before and considered by the jury at a capital sentencing hearing violates the Eighth Amendment. Henry v. Wainwright, supra, 661 F.2d at 58. In Proffitt, the court of appeals concluded that consideration by the sentencing judge of the nonstatutory aggravating factor of the defendant's "propensity to commit [murder]" and the danger he posed to society, which is virtually identical to the nonstatutory evidence interjected by the prosecutor in the present case, exceeds "the federal constitutional limitations imposed by Furman on capital sentencing by increasing the risk that the death penalty would be imposed in an arbitrary and capricious manner." Proffitt v. Wainwright, supra, 685 F.2d at 1267.

While in Henry and Proffitt the sentencer explicitly considered the nonstatutory aggravating circumstances, the Constitution is no less violated by the presentation of this evidence to the sentencer. If this Court's prior decisions limiting the introduction of evidence of aggravating circumstances to those defined by explicit legislative criteria are to have any force and effect, Godfrey v. Georgia, supra, 446

U.S. at 428, these limitations must be enforced. The prescribed factors in a capital sentencing scheme will have little effect, however, if prosecutors are able to interject extraneous factors or evidence whenever they desire. Furthermore, the Eleventh Circuit recognizes that there is no way for a court to determine from a general verdict what impact the constitutionally improper evidence had on the jury's decision to impose the death sentence. Henry v. Wainwright, supra, 661 F.2d at 59; Proffitt v. Wainwright, supra, 685 F.2d at 1269 (Rational appellate review of capital sentencing decisions contemplated by Furman and its progeny requires more than mere speculation or conjecture as to what the sentencing tribunal would have decided had the law been applied correctly). In contrast, the Fifth Circuit in the case at bar implicitly concluded that the death sentence was not infected by the evidence of a nonstatutory factor. This decision was reached in circumstances where the likelihood that the jury relied in whole or in part on the evidence was exacerbated by the prosecutor's suggestion at the end of his closing argument that the issue of future dangerousness was of central concern to the sentencing task of the jury:

> "I think we've proven our case beyond any doubt whatsoever of his dangerous potential, the potential to repeat this crime over and over. And, therefore, we must ask you, and I must ask you, to return the death penalty in this case." [TR. 643].

Consequently, while the issue may have arisen in different factual contexts, it is still clear that the Fifth and Eleventh Circuits are at loggerheads over the admissibility of evidence of nonstatutory aggravating circumstances and the effect of such evidence on the death determination. This conflict certainly justifies the grant of certiorari to review the judgment below.

As the above discussion reveals, there is a compelling need for the Court to resolve an issue that is basic to the

fair administration of a capital sentencing statute - the extent, if any, that a sentencer can be presented with, or asked to consider, evidence of nonstatutory aggravating circumstances in a capital case. This question has not been definitively resolved by this Court's prior pronouncements on capital sentencing practices, although the development of the law in this area strongly supports the need for declaring such evidence inadmissible under the Eighth Amendment. As a consequence of the lack of any explicit and definitive determination of this issue, a conflict between the two courts that are most frequently faced with death cases - the Fifth and Eleventh Circuits - has developed. Certiorari is therefore appropriate and necessary in the present case.

CONCLUSION

For the reasons mentioned above, the petitioner respectfully prays that the petition for writ of certiorari is granted.

Respectfully submitted,

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Dated:

prevent such sandbagging, it is appropriate that the burden of showing prejudice in this later phase should be placed upon the defendant, at least in situations in which the state is not responsible for the contact. The burden, however, should not be reinforced by a deemed presumption. The defendant may carry this burden by showing that reasonable jurors would have been affected to his prejudice.

[4] Applying this standard to the instant case, we find that the burden was not met. The transcript for the evidentiary hearing ordered below reveals that although some mention of one or more of the three incidents was made in the presence of other jurors prior to the commencement of the punishment phase, there was no discussion of them during jury deliberations.[17] It is entirely unpredictable whether the contacts moved the jurors involved to be more harsh or more lenient. All we know is that Miller by no means received the maximum sentence available,[18] and in light of the facts of this case it cannot be said that 60 years was excessive.

AFFIRMED IN PART, REVERSED IN PART.

Jimmy Lee GRAY, Petitioner-Appellant,

v.

Eddie LUCAS, Warden, et al., Respondents-Appellees.

No. 81-4018.

United States Court of Appeals, Fifth Circuit.

June 10, 1982.

An order of the United States District Court for the Southern District of Mississippi at Biloxi, William Harold Cox, J., denied habeas corpus relief to state prisoner, and petitioner appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) petitioner received constitutional assistance of counsel in his trial before lawfully chosen jury, and (2) defendant was sentenced to death under statutory and decisional procedures which contained no constitutional deficit.

Affirmed.

1. Criminal Law ⇐641.13(1)

Standard for constitutionally effective assistance of counsel is not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. U.S.C.A.Const.Amend. 6.

2. Criminal Law ⇐641.13(1)

Determination whether counsel rendered reasonably effective assistance turns in each case on totality of facts in entire record, and thus counsel's performance must be considered in light of number, nature and seriousness of charges, strength of prosecution's case and strength and complexity of defendant's possible defenses. U.S.C.A.Const.Amend. 6.

3. Criminal Law ⇐641.13(6)

To establish constitutional violation by failure of defense counsel to adequately investigate, defendant must show both failure to investigate adequately and prejudice arising from that failure. U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇐641.13(6)

When defendant alleges that his counsel's failure to investigate prevented his counsel from making informed tactical choice, he must show that knowledge of uninvestigated evidence would have altered his counsel's decision, and fact that investigation would have turned up admissible evidence is alone insufficient to show prejudice. U.S.C.A.Const.Amend. 6.

5. Criminal Law ⇐1166.11

On record, defendant was not prejudiced by decision of defense counsel not to investigate possible character testimony. U.S.C.A.Const.Amend. 6.

17. Record, vol. 2, at 24, 46, 75-76 and 82-84.

18. *See* note 1 *supra*.

6. Criminal Law ⇐641.13(6)

On record, investigation undertaken by defense counsel was adequate, given refusal of accused to identify anyone and given marginal effectiveness of possible character witnesses. U.S.C.A.Const.Amend. 6.

7. Criminal Law ⇐641.13(6)

Lawyer's failure to investigate witness who has been identified as crucial may indicate inadequate investigation, but failure to investigate everyone whose name happens to be mentioned by defendant does not suggest ineffective assistance. U.S.C.A.Const. Amend. 6.

8. Criminal Law ⇐641.13(6)

Defense counsel's tactical decision that good character testimony would be inconsistent with mentally disturbed defense did not constitute ineffective assistance. U.S. C.A.Const.Amend. 6.

9. Criminal Law ⇐641.13(6)

As against contention that defense counsel should not have relied on stale evidence consisting of personality inventory taken nine years before trial, defendant failed to show that more favorable evidence was available on his mental state and there was thus no reason to fault defense counsel's use of such test. U.S.C.A.Const. Amend. 6.

10. Criminal Law ⇐641.13(6)

Where personality test stated that defendant showed 95% probability of marked disturbance and that multiphasic index reflected emotional disorder of marked severity, responses being inappropriate, unrealistic and self-defeating and that test evidence strongly supported picture of severely disturbed person, results of test were clear enough to be comprehended by jury, and presentation of report to jury was sufficient, though it might have been better practice for defense to have called expert witness to explain test to jury. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐1166.11

Defendant failed to show prejudice from his counsel's failure to interview state's psychologist in view of fact, inter alia, that same would have given state extended chance to study evidence of defense, though it would have been better practice for defense counsel to have interviewed such witness. U.S.C.A.Const.Amend. 6.

12. Criminal Law ⇐641.13(2)

Defense counsel would not be faulted for not anticipating judicial holding discrediting use of testimony of future dangerousness of defendant. U.S.C.A.Const.Amend. 6.

13. Criminal Law ⇐1208(1)

Principle that when record presented to state appellate court is so deficient that it would be impossible for court to perform its constitutionally required review, the sentence cannot stand, is only applicable if omitted portion of record concerns matter which state court is required to review, and is not applicable to constitutionally mandated review of death sentences, which does not require state Supreme Court to search for possible *Witherspoon* violations. Miss. Code 1972, § 99-19-105(3); U.S.C.A.Const. Amend. 6.

14. Criminal Law ⇐1035(5)

Even if state courts were required to search out any *Witherspoon* violations, defendant was not prejudiced by state court's failure to do so in view of fact that court was able to reconstruct which jurors had been struck for cause and which had been struck peremptorily.

15. Jury ⇐108

Where prospective jurors' opposition to death penalty prevented them from being able to return death penalty under any circumstances, their exclusion from jury was proper. U.S.C.A.Const.Amend. 6.

16. Evidence ⇐356

District court did not abuse its discretion in overruling defense objection to admission of marked jury list used by court in reconstruction of strikes made at voir dire.

17. Habeas Corpus ⇐113(5½)

Matter which petitioner failed to raise in district court in habeas corpus hearing would not be reached on appeal. Fed.Rules Evid. Rule 103(a)(1), 28 U.S.C.A.

18. Habeas Corpus ⇐113(9)

Appellate court may supplement district court's opinion when record permits appellate court to make complete and fair resolution of issues presented.

19. Habeas Corpus ⇐90

In habeas corpus proceeding, trial court clearly erred in refusing to allow defendant to make offer of proof, but where substance of evidence which petitioner sought to elicit was apparent from context of his questions, reviewing court could discern whether questions were in fact relevant to claims. Fed. Rules Evid. Rule 103(a)(2), 28 U.S.C.A.

20. Habeas Corpus ⇐85.3(1)

In habeas corpus proceeding wherein petitioner claimed that there had been inadequate assistance of counsel, district court properly excluded, as irrelevant, questions of trial counsel about his interpretation of *Witherspoon*. U.S.C.A.Const.Amend. 6.

21. Habeas Corpus ⇐90

District court was not required to address those claims which were raised in habeas petition but were neither pursued nor pressed before the district court. U.S.C.A.Const.Amend. 6.

22. Habeas Corpus ⇐113(12)

Summary dismissal of claims in habeas corpus petition was improper with respect to those claims which were raised in petition and presented to district court in posthearing memorandum, but where issues posed by such claims raised questions only of law which did not require fact development to resolve, reviewing court was in as good a position as district court to answer such inquiries and interests of justice indicated that reviewing court should pass upon them without remand. 28 U.S.C.A. § 2106.

23. Habeas Corpus ⇐85.1(2)

In habeas corpus proceeding, state court's determination of what jury was permitted to find and obviously did find was presumptively correct unless rebutted.

24. Criminal Law ⇐1213

Mississippi's death penalty statute violated Eighth Amendment if it relied on barbaric or inhumane methods, was excessive in relation to crime committed or failed to ensure that death penalty was imposed in reasoned manner within particular class of cases, and fact that Mississippi chose not to impose death penalty for crime of simple murder committed in atrocious manner did not implicate Eighth Amendment. Miss. Code 1972, §§ 97-3-19(2), 99-19-105(3); U.S.C.A.Const.Amend. 8.

25. Criminal Law ⇐1206(1)

Where defendant did not claim that Mississippi death penalty statute was impermissibly directed at suspect class, only factor which could arguably justify departure from wide latitude traditionally accorded legislature's judgment was presence of death penalty, but such factor did not require higher level of scrutiny. Miss.Code 1972, § 99-19-103; U.S.C.A.Const.Amend. 14.

26. Criminal Law ⇐1206(1)

For constitutionality, it is required that death penalty be consistently imposed within class, but it is not required that death penalty be equally distributed among discrete classes of defendants. U.S.C.A.Const. Amends. 8, 14.

27. Criminal Law ⇐1206(1)

In view of Mississippi's consistently applying limiting construction, Mississippi statute providing for imposition of death penalty when offense was especially heinous, atrocious or cruel was not unconstitutionally vague. Miss.Code 1972, § 99-19-101(5)(h).

28. Criminal Law ⇐1208(1)

Under Mississippi death penalty statute, burden of proving aggravating circumstance exists as part of prosecution's general bundle, and defendant is permitted but not required to offer any relevant mitigating circumstances not encompassed in prosecutor's presentation. Miss.Code 1972, § 99-19-103.

29. Criminal Law ⇐1208(1)

Under Mississippi death penalty statute, no burden of proof or persuasion is assigned, just as defendant's option to develop proof of alibi, good character or mental instability does not operate to shift burden of proof, so choice to present any num-

ber or kind of mitigating circumstances does not. Miss.Code 1972, § 99-19-103.

30. Criminal Law ⇐1208(1)

Under Mississippi death penalty statute, even if jury finds that aggravating circumstances outweigh mitigating circumstances, it is not required to impose death penalty. Miss.Code 1972, § 99-19-103.

31. Criminal Law ⇐1208(1)

Under Mississippi death penalty statute, every mandatory element of proof is assigned to prosecution, and neither burden of production nor burden of proof ever shifts to defendant. Miss.Code 1972, § 99-19-103.

32. Criminal Law ⇐1206(1)

In view of construction of death penalty statute by Mississippi Supreme Court, allowing admission of only that evidence which is relevant to enumerated aggravating factors, statute was not shown to be unconstitutional, on its face or as applied, as allowing unchanneled discretion. Miss. Code 1972, § 99-19-101(1).

33. Constitutional Law ⇐250.3(1), 270(1)
Criminal Law ⇐1206(1)

Mississippi death penalty statute was not violative of equal protection and due process clauses by denying capital defendant's right to presentence report afforded to all other felons in state. U.S.C.A.Const. Amends. 5, 14; Miss.Code 1972, § 99-19-103.

34. Criminal Law ⇐1206(1)

Mississippi death statute was not unconstitutional as failing to provide any standard for jury in weighing aggravating factors against mitigating factors. Miss. Code 1972, § 99-19-103.

35. Criminal Law ⇐1206(1)

Mississippi death penalty statute is not invalid as failing to provide that prosecution bears burden of proof. Miss.Code 1972, § 99-19-103.

36. Criminal Law ⇐1206(1)

Mississippi death penalty statute was not invalid as failing to require that jury find beyond a reasonable doubt that aggravating circumstances outweighed mitigating circumstances before imposing death penalty. Miss.Code 1972, § 99-19-103.

37. Habeas Corpus ⇐85.1(2), 113(12)

In habeas corpus proceeding, determination whether confession was voluntary presented mixed question of law and fact and could be assessed independently by Court of Appeals, but it would be presumed that underlying facts found by state court were correct unless shown otherwise.

38. Habeas Corpus ⇐85.5(6)

In view of question of credibility in habeas corpus proceeding, petitioner's renewed claim that confession resulted from officer's threats was frivolous.

39. Habeas Corpus ⇐85.5(6)

Evidence in habeas corpus proceeding did not compel finding that lack of sleep vitiated voluntariness of confessions.

40. Criminal Law ⇐1035(5)

Defendant was not prejudiced by possibility that method of jury selection in Mississippi failed to reveal jurors who opposed death penalty. U.S.C.A.Const.Amends. 6, 14.

41. Habeas Corpus ⇐30(1)

Defendant could not complain on habeas corpus of asserted failure to instruct on lesser included offenses where, under state law, failure to request instructions precluded defendant from later raising that point.

42. Criminal Law ⇐13.1(1)

In evaluating vagueness challenge to state law, court is required to consider law in light of state court's interpretation of it.

43. Homicide ⇐351

Mississippi Supreme Court having made clear that aggravating factor in death penalty statute was applicable to person on parole at time of murder, aggravating circumstance, i.e., that murder was committed under sentence of imprisonment, was not unconstitutionally vague. Miss.Code 1972, § 99-19-103.

44. Criminal Law ⇐1206(1)

In view of construction by Mississippi state court, jury was not allowed to impose

death sentence on basis of nonstatutory factor. Miss.Code 1972, § 99-19-101(5)(e).

45. Homicide ⇐351

In view of construction by Mississippi state court, death penalty aggravating circumstance allowing imposition of death penalty if murder was committed for purpose of avoiding or preventing detection and lawful arrest of defendant was not overly broad. Miss.Code 1972, § 99-19-101(5)(e).

46. Criminal Law ⇐1206(1)

In view of construction by Mississippi state court, death penalty statute aggravating circumstance, i.e., that murder is especially heinous, atrocious or cruel, was not shown to be presently subject to inconsistent application. Miss.Code 1972, § 99-19-101(5)(h).

47. Criminal Law ⇐1206(1)

Mississippi Supreme Court's comparative review of death sentences was not shown to be flawed by reason of comparison of defendant's case with those cases where death sentence had been imposed but not with cases where it could have been imposed. Miss.Code 1972, § 99-19-105(3).

Richard E. Shapiro, New Orleans, La., Albert Sidney Johnston, Jr., Biloxi, Miss., for petitioner-appellant.

Bill Allain, Atty. Gen., Billy L. Gore, Jackson, Miss., for respondents-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, and THORNBERRY and GARZA, Circuit Judges.

CLARK, Chief Judge:

Jimmy Lee Gray appeals from the district court's order denying his petition for habeas corpus relief. We affirm.

I. Background

On June 25, 1976, Derissa Jean Scales, a three-year old girl, disappeared from her parents' apartment in Pascagoula, Mississippi. Because Gray, who lived nearby, was the last person seen with Derissa, he was questioned by the police about her disappearance. Gray admitted to the police that he had taken Derissa for a ride in the country, stopped the car on a back road, talked with Derissa and touched her vaginal area. He claimed that Derissa then wandered away from the car and fell into a shallow ditch filled with water. Gray stated that he pulled her out of the ditch while she was still breathing, put her into the trunk of his car half alive and began to drive back to Pascagoula. On the way back, Gray crossed a bridge over Black Creek. He stopped the car, opened the trunk, and threw Derissa Scales into the water.[1]

Gray was convicted in state court of capital murder and sentenced to death. The conviction, however, was reversed on appeal and the case was remanded for a new trial. *See Gray v. State*, 351 So.2d 1342 (Miss. 1977). About three weeks before the second trial, Fielding Wright and James Heidelberg were appointed to represent Gray. At the second trial, Gray was again convicted and sentenced to death. The second conviction was upheld on appeal. *See Gray v. State*, 375 So.2d 994 (Miss.1979), *cert. denied*, 446 U.S. 988, 100 S.Ct. 2975, 64 L.Ed.2d 847 (1980).

Gray filed a petition for habeas corpus alleging twenty-two separate constitutional violations. Chief among Gray's claims were that he had been denied effective assistance of counsel and that the record developed by the trial court was insufficient to determine the merits of his claim under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Although the district court only discussed these two claims in detail, it dismissed all of Gray's claims as

1. The state introduced evidence that Gray had not only touched Derissa but that he had sodomized her. On the basis of the bruises on her body and the manner in which her body was ultimately found, the state argued to the jury that Gray had intentionally caused Derissa's death either to silence her outcries or to prevent her from reporting what he had done to her.

lacking merit. On appeal, Gray reasserts his ineffective assistance and *Witherspoon* claims. He also contends that the evidentiary hearing held by the district court was inadequate, its findings of fact were inadequate and its disposition of the claims raised in his habeas petition was improper.

II. Ineffective Assistance

Because Gray's ineffective assistance claims are directed solely at his counsels' efforts during the sentencing phase of his second trial, we will discuss only that portion of the trial. Hindsight shows us that Wright and Heidelberg properly perceived that unless they could get Gray's statements to the police suppressed, they had little chance of avoiding a conviction at the guilt phase of his trial. Their primary aim became to avoid the death penalty at the sentencing phase. To this end, Heidelberg spoke with Gray frequently, explained to him the nature of the bifurcated trial, and asked him if there were anyone whom he wanted to testify on his behalf. Even though Gray steadfastly maintained that he did not want character witnesses, Heidelberg explored the possibility of having family members testify. This proved unsuccessful, however, since Gray's mother believed that her son should be executed and Gray's brother was unable to come to Mississippi for the trial. Heidelberg also spoke to a police officer who had befriended Gray and contacted Gray's local parole officer. He tried to get in touch with Gray's former employer and girlfriend, but both had left Pascagoula. Heidelberg talked with Louis Fondren, the attorney for Gray's first trial, and discussed possible witnesses with him.

Heidelberg also considered investigating two other sources of witnesses. Before Gray moved to Pascagoula, Gray had been imprisoned in Arizona for second degree murder. Because Gray had been a model prisoner, it was possible that people who had worked with Gray in prison could testify on his behalf. Heidelberg, however, chose not to pursue this testimony for two reasons. First, Gray did not provide Heidelberg with names of any of these witnesses and Arizona refused to release Gray's prison record, which might have contained such information. Although a suit could have been instituted in Arizona to compel the release of Gray's records, Heidelberg testified that the defense lacked the funds to file suit in Arizona. Moreover, even if the information had been available, Heidelberg was hesitant to rely on these witnesses. He felt the weight of their testimony on Gray's good character while imprisoned would be overcome by the emphasis they would place on Gray's previous conviction in Arizona for the murder of another young girl.

A second source of witnesses which Heidelberg considered using was a group of people who had written to Gray after the murder of Derissa Scales. Most of their correspondence concerned religious matters. Heidelberg decided, however, that these people would not make good witnesses because they had never known Gray personally and had only corresponded for a short time. Moreover, Heidelberg was concerned that some of these correspondents had only been interested in exploiting Gray.

Instead of trying to establish that Gray had some worth in his life, Wright and Heidelberg decided Gray's best chance to avoid the death penalty lay in trying to convince the jury he was mentally disturbed.[2] Gray had told Wright and Heidelberg that at times he became emotionally disturbed, that various things set him off and that while he knew what he was doing he could not stop himself from doing it. Being subject to such an irresistible impulse does not render a person legally insane in Mississippi. However, this emotional impairment can be offered as a mitigating factor at the sentencing phase.

To support this line of proof, Wright had Gray analysed by a local psychiatrist, Dr. Bridges. Dr. Bridges, however, advised Wright that his testimony would not sup-

2. Although Heidelberg investigated the use of character witnesses before deciding to rely solely on the theory that Gray was mentally disturbed, Wright appeared to have settled on this latter course from the start. He decided that a mentally disturbed defense fit the facts of the case and rejected the use of testimony on Gray's good character as inconsistent with this defense.

port Wright's theory. Wright therefore decided to rely on a standardized personality test, the Minnesota Multiphasic Personality Inventory, which Gray had taken approximately nine years before trial. This test concluded that there was a 95% probability that Gray was mentally disturbed. Wright had discussed the validity of the test with Dr. Bridges and was aware that it was dated. He felt, however, that its conclusion would be clear to the lay jury and that it was the most persuasive piece of evidence available to the defense.

To get this test admitted into evidence Wright made a deal with the prosecutor. The prosecutor would agree to let the test come into evidence if Wright would agree to let the state's psychologist, Dr. Stanley, testify in rebuttal. Stanley had previously examined Gray to determine if he were competent to stand trial. Wright stated that he had wanted Stanley to testify since Stanley's testimony could be used to establish that Gray was mentally disturbed. Although Wright did not interview Stanley before trial, he did review the reports which Stanley had compiled on Gray.

Gray's present counsel now faults the course pursued by Wright and Heidelberg for two reasons.[3] First, he claims that their failure to interview certain witnesses prevented them from making an informed decision on what defenses to offer at the sentencing phase. Second, he claims that having chosen to argue only that Gray was mentally disturbed, Wright and Heidelberg failed to prepare adequately for Gray's defense. He claims that these omissions deprived Gray of his right to the effective assistance of counsel.

[1, 2] In this circuit, the standard for constitutionally effective assistance of counsel is "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974). The determination of whether a counsel rendered reasonably effective assistance turns in each case on the totality of facts in the entire record. *See Washington v. Estelle*, 648 F.2d 276 (5th Cir.), *cert. denied*, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981); *United States v. Gray*, 565 F.2d 881 (5th Cir.), *cert. denied*, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978). Thus, we must consider a counsel's performance in light of "the number, nature, and seriousness of the charges . . . the strength of the prosecution's case and the strength and complexity of the defendant's possible defenses." *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 2021, 71 L.Ed.2d — (1982). In this context, we recently recognized that while attorneys are not held to a higher standard in capital cases, the severity of the charge is part of the " 'totality of circumstances in the entire record' that must be considered in the effective assistance calculus." *Id.*

Gray does not contend that Wright and Heidelberg were not reasonably likely to render effective assistance. He claims instead that they failed to render effective assistance by not fully investigating the use of character witnesses at the sentencing phase of his trial. Gray argues that Wright and Heidelberg should have investigated the people who had worked with him in the Arizona prison and people who had corresponded with him after he was imprisoned in Mississippi for Derissa Scales' murder. Gray established that the people who had worked with him in the Arizona prison would have testified that he had a satisfactory prison record and could function without problems in a prison environment. The people who had corresponded with Gray about religious matters would have testified that Gray had become very spiritual and exhibited a "caring, sharing type of interest in other people." Gray contends that the failure to investigate these witnesses prevented Wright and Heidelberg from making an informed decision about what defenses to present at the sentencing hearing.

3. Gray also claims that he was denied effective assistance of counsel because his counsel for the first trial, Louis Fondren, failed to tell Heidelberg about a possible character witness. However, the actions of Gray's counsel for the first trial have no bearing on the issue of whether Wright and Heidelberg provided Gray with effective assistance at his second trial.

We disagree.

[3, 4] We have previously recognized that adequate investigation is a requisite of effective assistance. *See Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979) (per curiam); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978) (per curiam). To establish a constitutional violation, a defendant must show both a failure to investigate adequately and prejudice arising from that failure. *See Washington v. Watkins*, 655 F.2d 1346, 1362 & n.32 (5th Cir. 1981). The determination of whether a defendant has been prejudiced varies of course with each breach alleged. When, as in this case, a defendant alleges that his counsel's failure to investigate prevented his counsel from making an informed tactical choice, he must show that knowledge of the uninvestigated evidence would have altered his counsel's decision. The fact that an investigation would have turned up admissible evidence is in itself insufficient to show prejudice. *Cf. Washington v. Strickland*, 673 F.2d 879 (5th Cir. 1982). A defendant must demonstrate that the bases underlying his counsel's tactical choice to pursue or forego a particular course would have been invalidated.

[5] Even if we assume that Wright and Heidelberg failed to make an adequate investigation, there is no indication that knowledge of the proffered testimony would have changed their decision. Their decision not to attempt to develop proof that Gray had some good in his makeup was not affected by what counsel has later discovered could have been shown. The decision was based on the fact that (1) such proof was inconsistent with a mentally disturbed defense, (2) the testimony of the Arizona prison officials would have reinforced the fact that Gray had murdered another young girl and (3) the weight of the testimony of the people who corresponded with Gray was undercut by their limited opportunity to know him. Even though Wright and Heidelberg did not know the exact nature of these witnesses' testimony, they were aware of both the potential and the weaknesses in the testimony.[4] Because the testimony proffered by Gray at the evidentiary hearing did not invalidate the reasons behind Wright and Heidelberg's tactical choice not to rely on character evidence, Gray was not prejudiced by their decision not to investigate.

[6, 7] Moreover, the investigation undertaken was adequate. Heidelberg sought out those people, Gray's relatives, friends, and employer, whom a counsel would have reasonably been expected to contact. Heidelberg did not fail to investigate other witnesses whom Gray had identified as crucial. Had he failed to do so, we might reach a different result. *See Kemp v. Leggett*, 635 F.2d 453 (5th Cir. 1981) (per curiam) (failure to interview the single eyewitness); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978) (per curiam) (failure to interview known eyewitnesses); *cf. Baty v. Balkcom*, 661 F.2d 391 (5th Cir. 1981) (failure to interview any witnesses). Gray, however, steadfastly maintained that he did not want anyone to testify on his behalf and refused to identify any witnesses.[5]

4. Heidelberg had testified that he had not pursued character testimony from the people who had corresponded with Gray because they had never had a chance to know him physically. At the evidentiary hearing, Gray established that one of these people, the Reverend Donna Spence, was a Pascagoula resident and had visited Gray in prison. Thus, with respect to one witness, one of the assumptions relied on for rejecting the use of character testimony was undercut. In light of our alternate holding, that the investigation was constitutionally adequate, we need not consider whether this minor discrepancy prejudiced Gray.

5. On this point, the district court found that although Gray's lawyers had sought to get Gray to tell them the names of witnesses who could testify in his behalf, Gray had not given his attorneys the name of one witness. Gray contends that this finding is clearly erroneous since his counsel were aware of people whom he had mentioned during the course of their discussions. Gray's argument misperceives the distinction drawn by the district court. The court did not find that Gray's lawyers were unaware of Gray's associates; it found that Gray had not identified any person as a potentially important or helpful witness. The distinction is an important one. While a lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation, the failure to investigate everyone whose name happens to be mentioned by

While Gray's refusal did not negate Heidelberg's duty to investigate, the scope of that duty was limited by Gray's refusal. *See Akridge v. Hopper*, 545 F.2d 457 (5th Cir.), *cert. denied*, 431 U.S. 941, 97 S.Ct. 2657, 53 L.Ed.2d 260 (1977). Moreover, the witnesses which Gray now claims should have been interviewed were not eyewitnesses to the crime and therefore crucial to the defense of the case. They were character witnesses, the value of whose testimony was assessed on a basis which assumed that they would testify favorably to Gray's character. Given Gray's refusal to identify anyone and given the marginal effectiveness of these character witnesses, the investigation Heidelberg undertook provided Gray with the assistance the constitution requires. *See Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980).

[8] Gray purports not to challenge Wright and Heidelberg's choice of trial strategy. However, some of his arguments are in fact directed solely at their decision to rely on a mentally disturbed defense rather than testimony on Gray's good character. We have rejected them. We have consistently recognized that a counsel's decision to pursue one course rather than another is not to be judged by hindsight. *See Winfrey v. Maggio*, 664 F.2d 550 (5th Cir. 1981). Moreover, the fact that a particular strategy may prove to be unsuccessful does not by itself establish ineffective assistance. *See id.* at 553. In the case at bar, Wright and Heidelberg could have reasonably decided that testimony on Gray's good character would not be persuasive to a jury aware of the nature of his crime. Moreover, their decision that good character testimony would be inconsistent with a mentally disturbed defense is perfectly reasonable. Although these two types of testimony need not be inconsistent, Wright and Heidelberg could have reasonably determined that in this case a local jury would perceive them to be inconsistent. In short, counsel's tactical decision did not constitute ineffective assistance.

Gray argues alternatively that Wright and Heidelberg failed to prepare adequately for the defense they did present—that he was mentally disturbed. He claims that they should have investigated more thoroughly the Minnesota Multiphasic Personality Inventory which was admitted into evidence at the sentencing hearing and that they should have interviewed Dr. Stanley, the state's witness, before he testified.

The personality test which Wright and Heidelberg relied on was flawed by the fact that Gray had taken the test nine years before trial. Because of its age, the test's methodology was slightly outmoded and its relevance to Gray's mental state at the time of the murder was lessened. Wright, however, was completely aware of the test's weaknesses. He had discussed both the validity of the test and its interpretation with Dr. Bridges, the private psychiatrist who had interviewed Gray. Although Gray claims that Wright should have investigated the test more thoroughly, he has not indicated what further investigation his counsel should have taken or that the investigation undertaken did not allow Wright to anticipate the test's weaknesses.

[9, 10] Gray's main objections appear to be primarily that Wright should not have relied on such stale evidence and that he should have introduced the test through an expert. However, because Gray has not shown that more favorable evidence was available on his mental state, we have no reason to fault Wright's use of the test. With respect to Gray's claim that the test should have been explained by an expert, we agree that the use of an expert might have been preferable. However, the test set out its results clearly and explicitly. The test stated that Gray showed a 95% probability of marked disturbance. Immediately below that finding, the test stated:

> INTERPRETATION ...
>
> THE MI, MULTIPHASIC INDEX, REFLECTS AN EMOTIONAL DISORDER OF MARKED SEVERITY. RESPONSES ARE INAPPROPRIATE,

the defendant does not suggest ineffective assistance.

UNREALISTIC AND SELF-DEFEATING.

The test concluded:

...MULTIPHASIC SUMMARY AND IMPRESSION...
TEST EVIDENCE STRONGLY SUPPORTS THE PICTURE OF A SEVERELY DISTURBED PERSON.

These statements clearly supported the defense theory and were readily comprehensible by a layman.[6] Although it might have been better practice for the defense to have called an expert witness to explain the test to the jury, the right to effective assistance does not entitle a defendant to the best defense possible, but only a reasonably effective defense. Because the test's results were clear enough to have been comprehended by the jury, presentation of the report to the jury was sufficient.

[11, 12] Gray, finally, faults his counsel for not interviewing Stanley, the state's rebuttal witness, prior to his testimony. Gray contends that Wright's familiarity with Stanley's reports was insufficient preparation for trial. We disagree. We have previously recognized the "critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976). Thus, we have held that the failure to seek psychiatric testimony may constitute ineffective assistance. *See id.* (failure to move for a court appointed psychiatrist); *United States v. Edwards*, 488 F.2d 1154, 1164 (5th Cir. 1974) (failure to pursue a successful motion for a court appointed psychiatrist); *Greer v. Beto*, 379 F.2d 923, 925 (5th Cir. 1967) (failure to offer any evidence on defendant's mental condition). The case at bar does not concern a failure to seek any psychiatric testimony; instead, it concerns the extent of preparation required prior to presenting a psychiatrically related defense. We need not, however, explore the perimeters of this issue since we find that Gray was not prejudiced by his counsel's failure to interview Stanley.

Stanley's testimony on direct examination falls into two parts. In the first part, Stanley presented the jury with an analysis of Gray's personality based on his earlier observations of Gray. This part of Stanley's testimony repeats almost verbatim a report which Stanley had prepared on February 1, 1978, and which Wright had previously studied. Because Wright could not have gained a clearer understanding of this part of Stanley's testimony if he had interviewed Stanley extensively, Gray was not prejudiced by the fact that Wright had only read Stanley's report.

The second part of Stanley's testimony concerns the Minnesota Multiphasic Personality Inventory and Stanley's interpretation of it. Stanley had not seen the results of the test as administered to Gray. This had been done by the Arizona prison officials.[7] Thus, Wright could have obtained Stanley's views on Gray's test only by allowing Stanley, the state's rebuttal witness, to examine the test before trial. We refuse to fault Wright for not giving the state an extended chance to study the defense's evidence.

Although Gray alleges that he was prejudiced in two respects, neither withstands scrutiny. First, Gray claims that if Wright had interviewed Stanley he would have been aware that Stanley would discount the validity of the personality test. Gray notes Stanley's testimony that, because of the test's age, its results should be taken "with a grain of salt." Wright, however, was fully aware, because of his discussions with another psychiatrist, that the test results were dated. Gray has not shown that Wright's preparation prevented him in any way from anticipating Stanley's objections.

Gray also claims that if Wright had interviewed Stanley, he would have been aware of Stanley's opinion that Gray was likely to repeat his crime. An examination of the

6. Dr. Stanley testified at the evidentiary hearing that it would take a psychologist to understand the significance of this report. Although psychological training would aid in interpreting the exact condition described by the report, the report is sufficiently clear to indicate as a general matter that Gray was mentally disturbed.

7. Stanley testified that he had given the test a cursory examination an hour before he testified.

testimony at the sentencing phase of the trial, however, reveals that it was the prosecutor, and not Stanley, who put this gloss on Stanley's analysis of Gray.

The prospect that Gray presented a future danger was raised three times during Stanley's direct testimony. Each time, it was the prosecutor who interjected this idea into Stanley's testimony. Stanley had testified extensively about Gray without concluding that Gray would be likely to repeat his crime. The prosecutor then raised the issue for the first time:

Q. Now, in regard to this hostile personality, Doctor, if in the future, he gets mad at somebody, will he repeat the act of murder?

A. The best statistics psychologically, where psychological research shows, is that the best prediction of future behavior is to look at past behavior. And, I would suggest that you know, looking at past behavior worth the personality profile he shows, I would have to answer yes.—That the chances are better than average, very good, as a matter of fact.

Later, after questioning Stanley about the validity of the personality test, the prosecutor asked:

Q. All right, Sir. One question. I ask you this. One phrase here, probability—.

A. Of marked disturbance?

Q. Marked disturbance, or ability to repeat the crime. I believe they had it marked, what?

A. 95%

Q. And does that match your findings you just said about the opportunity, or the chances of the defendant repeating his crime at this time?

A. Well, as a scientist, I hate to put behavioral things in percentages, but I can't argue with it.

The personality test did not indicate, however, that Gray exhibited a 95% probability of "[m]arked disturbance, or ability to repeat the crime." It stated only that he showed a probability of marked disturbance. While Stanley quoted the test accurately, it was the prosecutor who interjected the idea of future dangerousness into the test results. Finally, after Stanley had discussed the contents of the personality test without any reference to future dangerousness, the prosecutor concluded:

Q. All right. I wasn't asking you in terms of percentages, but that report does agree that the—with your statement a few minutes ago, that the defendant's hostility would lead him to [be] a repeater in this type of crime?

A. Oh, yes, I think so. It would all fit together.

Although both the personality test and Stanley's observations of Gray may have been compatible with the prosecutor's suggestion that Gray was likely to repeat his crime, neither the personality test nor Stanley had advanced that conclusion independently. The idea of future dangerousness was interjected solely by the prosecutor. There is no indication that a pretrial interview of Stanley would have revealed that this issue would arise at trial.[8] While it would have been better practice for Wright to have interviewed Stanley, we cannot say that, on these facts, Gray was prejudiced by the failure to do so.[9]

III. Adequacy of the State Records

During voir dire, seven prospective jurors stated that they had scruples against capi-

8. Clearly, this element was not as strongly emphasized in the jury's mind by this opinion dialogue with the expert witness, as it would have been had counsel adduced testimony from people who had worked with Gray in the Arizona prison and given the prosecutor an opportunity to hammer home that Derissa Jean Scales was Gray's second young female victim.

9. Gray claims that Wright's failure to object to the prosecutor's interjection of future dangerousness also demonstrated his ineffective assistance. Gray relies, however, on cases which have only recently discredited the use of such testimony. *See Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), *aff'd* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Because our opinion in *Smith* was delivered three years after Gray's trial, we do not fault Gray's counsel for not anticipating our holding. *See Engle v. Isaac*, — U.S. —, —, 102 S.Ct. 1558, 1574, 71 L.Ed.2d 783 (1982).

tal punishment. These jurors were then questioned to determine the extent of their opposition to the death penalty. Although the attorneys' questions and the jurors' responses were transcribed, the subsequent challenges for cause and preemptory challenges were not recorded.

Gray did not contend on direct appeal to the state supreme court, nor does he contend now,[10] that any of the jurors were improperly excluded under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Instead, he argues that Mississippi's death penalty statute requires, as a constitutionally mandated procedure, that the state supreme court review each death sentence to determine if it were arbitrarily imposed. *See* Miss.Code Ann. § 99-19-105(3). Gray contends that because the inadequate state records prevented the state supreme court from determining whether any *Witherspoon* violations occurred, the court was precluded from engaging in its constitutionally required review.

The premise of Gray's claim is that the Mississippi Supreme Court was constitutionally required to scan the record of his trial to determine if any jurors were improperly excluded under *Witherspoon*. Gray contends that this is so because a sentence imposed by a jury organized to return the death penalty poses the same risk of arbitrariness that the Court identified as unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[13] In *Stephens v. Zant*, 631 F.2d 397, 402-03 (5th Cir. 1980),[11] we recognized that when the record presented to a state appellate court is so deficient that it would be impossible for the court to perform its constitutionally required review, the sentence cannot stand. However, *Stephens* is only applicable if the omitted portion of the record concerns a matter which the state court is required to review. Because we find that the constitutionally mandated review of death sentences does not require a state supreme court to search for possible *Witherspoon* violations, the trial court's failure to develop a record on this point did not affect the validity of Gray's sentence.

In *Furman v. Georgia*, *supra*, three of the Justices reasoned that because juries had previously been given complete discretion to return the death penalty, the penalty had been arbitrarily imposed in violation of the eighth amendment. *See* 408 U.S. at 240, 92 S.Ct. at 2727 (Douglas, J. concurring); 408 U.S. at 306, 92 S.Ct. at 2760 (Stewart, J. concurring); 408 U.S. at 310, 92 S.Ct. at 2763 (White, J. concurring). Justice Stewart found:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.

498 U.S. at 310-11, 92 S.Ct. at 2762 (footnotes omitted).

10. Gray's argument on this point is based on the sixth claim raised in his habeas petition. Although Gray alleged in a separate claim that jurors may have been improperly excluded under *Witherspoon*, that claim does not serve as a premise of the argument raised here. We note, however, that no jurors were improperly excluded under *Witherspoon*. *See* note 12 *infra*.

11. The Supreme Court granted certiorari to consider one of the issues raised in *Stephens*, *supra*, whether a death sentence based on several aggravating factors may be upheld by a state supreme court when one of the aggravating circumstances is subsequently found invalid. *See Zant v. Stephens*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981). Because the Court was unsure of the premises underlying the state court's ruling that it could uphold such a sentence, the Court delayed taking any action on this case until the Georgia Supreme Court explained the basis of its decision. *See Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982). Because Gray relies on a different proposition in our decision in *Stephens* than the one on which certiorari was granted, the Supreme Court's action in this case does not affect our resolution of the issue raised by Gray.

Four years later in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court upheld the imposition of a death penalty because the procedures adopted by the state of Georgia were sufficient to remedy the randomness which had been condemned in *Furman*. One of the procedures which the Court noted with approval was the fact that the state supreme court automatically reviewed each conviction to determine whether it had been imposed under the influence of passion or prejudice and whether the sentence of death were excessive or disproportionate to the penalty imposed in similar cases. This review helped ensure that the death sentence "would be imposed in a more consistent and rational manner and . . . that there would be a 'meaningful basis for distinguishing the . . . cases in which it is imposed . . . from the many cases in which it is not.'" *Lockett v. Ohio*, 438 U.S. 586, 601, 98 S.Ct. 2954, 2963, 57 L.Ed.2d 973 (1978). A state supreme court is thus required by *Furman* and *Gregg* to review the record for any *Witherspoon* violations only if such a search would promote the consistent imposition of the death penalty. We find that it would not.

Witherspoon v. Illinois found that the exclusion of jurors who merely had scruples against the death penalty violated a defendant's sixth amendment right to an impartial jury. The decision was premised on the grounds that while a state has no valid interest in excluding a juror who states that he can follow the law, a defendant is seriously prejudiced by the exclusion of all jurors opposed to capital punishment. *See Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 2525, 65 L.Ed.2d 581 (1980). *Witherspoon* was thus concerned with the question of who decides whether the death penalty should be imposed. It sought to ensure that the jury that determines the death penalty be drawn from a fair cross section of the community.

Inclusion of a fair cross section of the community, however, does not advance the interest identified in *Furman* and *Gregg*, the consistent and reasoned imposition of the death penalty. If anything, expanding the ideological base from which jurors are drawn, as *Witherspoon* does, leads to greater diversity within and among juries and less uniform results. Thus, we find that a state appellate court may satisfy the constitutional objections noted in *Furman* and *Gregg*, without making an independent assessment of the jury composition under *Witherspoon*. *Cf. Spinkellink v. Wainwright*, 578 F.2d 582, 598–99 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

[14, 15] Moreover, we note that when this issue was raised in the district court, the court was able to reconstruct which jurors had been struck for cause and which had been struck peremptorily. The court based its determination on testimony by the counsel for both parties and on a jury list which Wright had marked during voir dire. Although Gray attacks the validity of this reconstruction, he does not claim that any of the jurors were improperly excluded under *Witherspoon*. Thus, even if the state court were required to search out any *Witherspoon* violations, Gray was not prejudiced by its failure to do so.[12] *See Stephens v. Zant*, 631 F.2d 397, 404 (5th Cir. 1980).

[16, 17] Gray objects to the district court's reconstruction of the strikes made at voir dire because he claims that the marked jury list was improperly admitted and because the district court's findings were clearly erroneous. Gray objected to the

12. Under the record developed by the district court, three prospective jurors were struck for cause because of their objections to the death penalty; Mr. Dees, Mrs. Anderson, and Mrs. Lawrence. Mr. Dees testified, "[A]s far as applying the death sentence, my religious beliefs would never let me do it." In response to the question whether her reservations about the death penalty would allow her to return a verdict based on the evidence and the law, Mrs. Anderson replied, "No I couldn't do it." In response to the same question, Mrs. Lawrence responded, "I could not." Because these jurors' opposition to the death penalty prevented them from being able to return the death penalty under any circumstances, their exclusion from the jury was proper. *See Witherspoon v. Illinois*, 391 U.S. at 522 n.21, 88 S.Ct. at 1777 n.21.

admission of the marked jury list on the ground that it was unreliable. However, because the list was marked as the objections were made, there is no indication that its accuracy was marred by a lapse of time. Moreover, because Wright marked the list to keep track of preemptory strikes and strikes for cause for his own use at trial, there is every indication that the list was carefully and accurately marked. We cannot say that the district court abused its discretion in overruling Gray's objection to the list's admission. *See Page v. Barko Hydraulics*, 673 F.2d 134 (5th Cir. 1982), *Richardson v. McClung*, 559 F.2d 395, 396 (5th Cir. 1977) (per curiam).[13]

Gray also argues that the district court's reconstruction of the strikes was clearly erroneous. The basis of his claim is that the district court judge mistakenly attributed the testimony given by the state prosecutor to the state judge. Although the district court did refer to testimony given by the state prosecutor as the state judge's testimony, the reference is somewhat unclear since the state prosecutor had been appointed a state judge prior to the district court's evidentiary hearing. The district court continually referred to both men as "judge" throughout the hearing. However, even if we disregard the allegedly misidentified testimony, there is still sufficient evidence to convince us that the district court's reconstruction was not clearly erroneous. *See Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981) (en banc).

IV. The Adequacy of the Evidentiary Hearing

Gray argues that the district court failed to apply the proper legal standards, failed to make adequate factual findings and improperly ruled on the admission of evidence.[14]

Gray contends that, in evaluating his ineffective assistance claims, the district court applied the wrong law. It considered the course of Wright and Heidelberg's conduct over the whole trial instead of considering whether they failed to conduct an adequate investigation in preparation for the sentencing phase. Gray argues that the district court should be reversed for applying the wrong legal standards. This point in Gray's argument is unclear. In any event, on this appeal Gray has enumerated the alleged legal errors of the district court, we have considered them fully and affirm the result reached by the district court.

[18] Gray also argues that because the district court misperceived the applicable law, it failed to make the factual findings necessary for appellate review. This claim raises a slightly greater problem since the district court's resolution of factual issues facilitates appellate review. *See Hart v. United States*, 565 F.2d 360, 362 (5th Cir. 1978) (per curiam). However, an appellate court may supplement the district court's opinion when the record permits us to make a complete and fair resolution of the issues presented. *See Pullman-Standard v. Swint*, — U.S. —, —, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66 (1982); *Matter of Legel, Braswell Government Securities Corp.*, 648 F.2d 321, 326 n.8 (5th Cir. 1981); *Perry v. Texas*, 456 F.2d 879, 881 (5th Cir.), *cert. denied*, 409 U.S. 916, 93 S.Ct. 248, 34 L.Ed.2d 178 (1972).

Although Gray claims that the testimony in the record is too conflicting to allow a fair resolution of the issues, he only notes

13. On appeal Gray asserted that the list was inadmissible because it was hearsay. We do not reach this claim since Gray failed to raise this ground for not admitting the evidence before the district court. *See* Fed.R.Evid. 103(a)(1); *Wright v. Hartford Accident & Indemnity*, 580 F.2d 809, 810 (5th Cir. 1978) (per curiam); *Markel Service v. National Farm Lines*, 426 F.2d 1123, 1228 (8th Cir. 1970).

14. Although Gray alleges that several specific errors were committed by the district court, the underlying theme of his argument is that the district court so misperceived his arguments that the evidentiary hearing was, as a whole, inadequate. We have reviewed the transcript of the evidentiary hearing and find that, with the two exceptions noted below, Gray was able to present the factual underpinnings of his theories completely. While the trial judge may have doubted the relevance of some of Gray's evidence, Gray was not prevented from making an adequate factual record. Our review of the evidentiary hearing convinces us that Gray was given a fair opportunity to prove his claims.

one instance of that conflict. He claims that Wright's and Heidelberg's testimony differed on a critical issue, the choice of defense tactics. Gray notes that Heidelberg investigated the use of character witnesses before rejecting that line of defense while Wright appears to have rejected this defense from the start of the case. Gray does not argue that there was any dispute about the course which each counsel pursued. Instead, he argues that their inconsistent courses cast doubt on the basis of their decision not to rely on character witnesses. There is no difficulty, however, in resolving the testimony of these two attorneys. Wright adopted a general defense strategy after reviewing the facts of the case. Heidelberg did more of the investigative or background work. This pattern is perfectly consistent with the allocation of responsibility between co-counsel. Heidelberg's investigation simply did not convince him that Wright's initial strategy should be altered and both counsel ultimately adhered to that course. There is no indication that their testimony was inconsistent or that Gray did not receive the benefit of Heidelberg's investigation.

[19] Gray finally faults the district court for twice preventing his counsel from questioning Wright and for refusing his offers of proof. Because we find that the questions asked were irrelevant to the claims Gray presented, we uphold the court's rulings. We note, however, that the court clearly erred in refusing to allow Gray to make an offer of proof. *See* Fed.R. Evid. 103(a)(2).

An offer of proof is required to perfect an objection to the exclusion of evidence. *See* Fed.R.Evid. 103(a)(2). It allows an appellate court to reevaluate the trial court's decision in light of the actual evidence to be offered and to determine whether any prejudice resulted from the exclusion of evidence. *See Fortunato v. Ford Motor Co.*, 464 F.2d 962 (2d Cir. 1972). An offer of proof is not necessary, however, when the substance of the evidence is "apparent from the context within which the questions were asked." Fed.R.Evid. 103(a)(2). Although this later exception is normally relied on by litigants who have failed to make an offer of proof, we rely on it now as providing an adequate basis for reviewing the district court's evidentiary rulings. Because the substance of the evidence Gray sought to elicit was apparent from the context of his questions, we are able to discern whether the questions were in fact relevant to his claims.

Gray's counsel at the evidentiary hearing questioned Wright about a computer "hit." It was developed that when Gray had been picked up by the Pascagoula police, they ran a computer check on him. The computer erroneously showed a "hit"; it indicated that Gray was wanted by the Wisconsin police. The Pascagoula police held Gray overnight, during which time he confessed to the police.

After questioning Wright about the circumstances of Gray's arrest, Gray's counsel began to ask whether Wright had checked to see if the police had acted in good faith in holding Gray overnight. Wright replied that he had not inquired into the police's good faith since their treatment of Gray accorded with what he understood to be normal police practice. When Gray's counsel continued to probe into why Wright had not investigated further, the district court sustained the state's objection to this line of questioning.

[20] Gray argues that because these questions were relevant to his claims of ineffective assistance, the district court's ruling was incorrect. Gray, however, did not allege in his petition for habeas corpus that Wright had been ineffective for failing to investigate his detention. The extent of Wright's investigation into Gray's detention was thus irrelevant to the effectiveness of counsel claims raised in the habeas petition.

Alternatively, Gray claims that a complete development of the facts surrounding his detention was necessary to determine whether his subsequent confessions had been properly admitted at trial. Although information on this point would have been relevant to the voluntariness claims raised in Gray's habeas petition, the questions asked by Gray's counsel could not lead to a development of such information. The

questions asked Wright went to the extent of his investigation and why Wright had chosen not to inquire into the officers' good faith in holding Gray. Since Wright stated he made no such investigation in view of his past experience, further questions addressed to Wright could not have illuminated the factual issues surrounding Gray's detention. Indeed, Gray had already raised these claims in state court and the testimony developed there provided an adequate record of the events that transpired. If Gray's counsel needed to develop any further information about the officers' motives, he should have questioned the officers themselves since Wright had already provided the court with all the information he had on this point. The district court did not abuse its discretion in sustaining the state's objection.

Gray also faults the district court for preventing his counsel from inquiring into Wright's knowledge of *Witherspoon v. Illinois*. On direct examination, he had questioned, without any objection, whether Wright was familiar with *Witherspoon*. On redirect, he sought to question Wright about his interpretation of *Witherspoon*. It was this later line of questioning to which the district court objected.

Wright's understanding of *Witherspoon*, however, was irrelevant since Gray had not claimed in his habeas petition that Wright was ineffective because he lacked knowledge of *Witherspoon* or failed to object to the exclusion of jurors. Gray argues that Wright's knowledge of *Witherspoon* was relevant because it bore on his ability to recall whether the voir dire challenges were valid. This misstates the issue. The issue was not whether certain challenges were valid [13] or whether Wright was aware of their validity. Because the district court sought to reconstruct the prosecutor's strikes, the only relevant issue was which jurors were struck for cause under *Witherspoon* and which were struck preemptorily. Wright's precise understanding of *Witherspoon* would not have affected his ability to recall the prosecutor's stated reasons for striking a particular juror.

V. Failure to Consider Claims

Gray's petition for habeas corpus contained twenty-two separate claims. At the evidentiary hearing held by the district court, Gray presented evidence on two of the issues, ineffective assistance and the state trial court's failure to record *Witherspoon* objections. In his Post-Hearing Memorandum, Gray presented arguments on the two claims which were pursued at the evidentiary hearing and on six other claims which he had raised in his habeas petition. Thus, Gray neither presented evidence nor any further legal arguments on fourteen of the twenty-two claims raised in his habeas petition.

In its Memorandum Opinion, the district court only discussed the two claims Gray pressed at the evidentiary hearing. Although it alluded generally to the constitutionality of Mississippi's capital punishment statute, the district court never discussed the particular arguments raised by Gray on that point. In the concluding paragraph of its opinion, the district court stated, "[I]t is the considered judgment of this court . . . that every one of [Gray's] constitutional rights [has] been respected in every phase of this entire case [and] that the petition of Jimmy Lee Gray is without merit in its entirety . . . ."

Gray does not argue that the district court's decision on the merits of his claims is incorrect. He argues that the summary manner in which it dismissed his claims was improper. The claims raised in Gray's habeas petition may be divided into three categories. First, there are the two claims which Gray admits were considered and discussed by the district court. Second, there are six additional claims which Gray raised in his habeas petition and reasserted in his Post-Hearing Memorandum which the dis-

13. Even if the validity of the challenges under *Witherspoon* were at issue, Wright's opinion on their validity was irrelevant. The district court possessed the transcript of the voir dire and could determine independently whether any of the jurors had been incorrectly excluded. The defect identified in *Funicello v. New Jersey*, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), is thus not present in this case.

trict court may have denied in the sentence quoted above. Third, there are fourteen remaining claims which Gray raised in his habeas petition but neither pursued nor presented again to the district court.

Because Gray does not contend that the district court failed to offer a sufficient explanation of its ruling on the first category of his claims, the validity of the manner in which it treated those claims is not at issue. With respect to the second category of claims, those raised in the habeas petition and argued in the Post-Hearing Memorandum, we agree with Gray that the district court's summary dismissal was inadequate. In *Washington v. Strickland*, 673 F.2d 879 (5th Cir. 1982), we recently recognized that a district court is required to offer some explanation of its ruling on each ground of relief raised in a petition for habeas corpus. Although *Strickland* recognized that in many instances only a brief explanation is required, the district court failed to offer any explanation in this case. We thus agree that the court erred in the manner in which it treated this second category of claims.

[21] With respect to the third category of claims, those which were raised in Gray's habeas petition but neither pursued nor pressed before the district court, we find that the district court did not need to address those claims. *See Harper v. Merckle*, 638 F.2d 848, 855 (5th Cir. 1981); *Corenswet, Inc. v. Amana Refrigeration*, 594 F.2d 129, 139 (5th Cir. 1979); *accord Bast v. Department of Justice*, 665 F.2d 1251 (D.C. Cir.1981); *Stanspec Corp. v. Jelco, Inc.*, 464 F.2d 1184, 1187 (10th Cir. 1972); *King v. Stevenson*, 445 F.2d 565, 570–71 (7th Cir. 1971); *Ark-Tenn Distributing Corp. v. Breidt*, 209 F.2d 359, 361 (3d Cir. 1954).

Sound reasons exist for the application of this rule. Our adversary system of justice depends in large part on "that concrete adverseness which sharpens the presentation of issues" and illuminates the disposition of difficult claims. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). By raising a claim in the pleadings but failing to pursue it any further, a litigant fails to apprise the court fully of the legal and factual underpinnings of his claims. Instead of having issues clarified during the course of a trial by hearings, arguments or memoranda, the district court is left to divine the legal and factual bases of a claim on its own. This deprives the court of the benefits the adversary system was designed to confer. Moreover, when a party fails to press his claims, a district court is left in doubt as to whether any live controversy remains on that point. While a party must of course raise his claims in the pleadings, the pleadings only mark the beginning of a lawsuit. Having plead his claims correctly, a litigant may not abandon any further pursuit of his claims and then complain because the district court failed to address his contentions.

The requirement that a litigant must pursue as well as raise his claims is particularly appropriate in light of our holding in *Strickland*. The burden which *Strickland* places on the district court to address each claim raised in a habeas petition puts a concomitant duty on counsel to give the court a full development of every claim he does not waive. We note also that raising multiple undeveloped claims gives rise to the possibility of using pleadings for delay. Without attributing any such motive to Gray's counsel, we note that such a tactic may be appealing in death penalty cases where delay may be a defendant's main hope.

By requiring a party to pursue his claims actively, the issues are clarified and can be resolved by the district court with greater skill and speed. Adequate development of the issues also allows the district court to identify frivolous claims more easily and remove them from consideration. To the extent that attorneys are discouraged from filing frivolous claims, the habeas petitioner himself is aided since both the court and the petitioner's attorney are able to focus on those claims which merit the most attention. We thus find that those claims which Gray raised in his petition for habeas corpus but never pressed or presented again to the district court were abandoned.

[22] The district court's summary dismissal of Gray's claims was therefore improper only with respect to the second category of claims, those claims which were raised in the petition for habeas corpus and presented to the district court in Gray's Post-Hearing Memorandum. In *Strickland, supra*, we remanded the petitioner's claims which had been summarily dismissed since an explanation by the district court of its rulings "will enable this court to give meaningful review to the district court's factual and legal conclusions." 673 F.2d at 907. However, the issues posed by the remaining six claims raise questions only of law which do not require fact development to resolve. Because we are in as good a position as the district court to answer these inquiries, the interests of justice indicate we should pass on them here and now rather than remand the cause and delay their ultimate disposition. 28 U.S.C. § 2106.

1. The Constitutionality of the Mississippi State Statute

[23] Gray's attack on Mississippi's capital punishment statute is itself composed of nine separate arguments. First, Gray claims that Mississippi allows a jury to impose the death sentence when there has been no finding of intent. *See* Miss.Code Ann. § 97-3-19(2). Gray argues that because there was no finding either at the guilt or sentencing phase of his trial that he purposefully or intentionally acted to kill Derissa Scales, death is an excessive penalty in violation of the eighth amendment. Although this claim might pose a difficult question of constitutional law, we need not resolve it in this case since the assumption underlying the argument is missing in Gray's case.

The jury found beyond a reasonable doubt that Gray had purposefully taken Derissa Scales' life to avoid capture. In reviewing Gray's conviction, the Mississippi Supreme Court stated:

> It is now contended in Gray's behalf that a "very serious" dispute exists as to whether Gray had the deliberate design to effect the death of the child. However, the jury had before it all of the evidence given during the trial of the guilt phase.... Upon the entire record, the jury was justified in finding beyond a reasonable doubt that the child had been killed by Gray intentionally and maliciously for the purpose of silencing her outcries or preventing the report by her of acts of molestation.

Gray v. State, 375 So.2d at 1004. The state court's determination of what the jury was permitted to find and obviously did find is presumptively correct unless rebutted, which Gray has not attempted to do. *See Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

Second, Gray argues that the Mississippi statute is unconstitutional because it is underinclusive. He points out that the Mississippi statute allows a jury to impose the death penalty solely because a murder is committed during the course of certain specified felonies, but it does not authorize the death penalty for a simple murder, no matter how atrocious. Gray claims that this distinction violates the eighth amendment, due process and equal protection. We disagree.

[24] With respect to Gray's eighth amendment claim, it is the imposition of a penalty which triggers eighth amendment scrutiny. *See Gregg v. Georgia*, 428 U.S. at 199, 96 S.Ct. at 2937. A particular punishment may violate the eighth amendment if the punishment itself is particularly "barbaric" or if it is excessive in relation to the crime committed. *See Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). In the context of capital punishment, the Court has recognized that the eighth amendment requires regularity in the imposition of the death penalty. *See Gregg, supra*. Thus, Mississippi's death penalty statute violates the eighth amendment if it relies on barbaric or inhumane methods, is excessive in relation to the crime committed or fails to ensure that the death penalty is imposed in a reasoned manner within a particular class of cases. The fact that Mississippi chooses not to impose the death penalty for the crime of simple murder committed in an atrocious manner simply does not implicate the eighth amendment.

[25] An allegedly improper classification scheme may, however, violate either the due process or equal protection clauses. In reviewing equal protection and due process claims, our initial inquiry is to identify the proper level of scrutiny. *See Arceneaux v. Treen*, 671 F.2d 128 (5th Cir. 1982). Traditionally, courts have accorded legislative classifications of criminal activity wide latitude. *See Patterson v. New York*, 432 U.S. 197, 201, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977); *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 242, 2 L.Ed.2d 228 (1957). Legislatures may recognize degrees of evil and may seek to deal with undesirable conduct one step at a time. *See Skinner v. Oklahoma*, 316 U.S. 535, 540, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942). This deference has been accorded the legislature's judgment because it is particularly within a legislature's competence both to identify conduct which offends the community and to determine appropriate punishment. Because Gray does not claim that the Mississippi statute is impermissibly directed at a suspect class, the only factor which could arguably justify a departure from the wide latitude traditionally accorded a legislature's judgment is the presence of the death penalty. *See Skinner v. Oklahoma*, 316 U.S. at 541–42, 62 S.Ct. at 1113–14. *Gregg v. Georgia*, however, teaches that this factor does not require a higher level of scrutiny.

In *Gregg*, the Supreme Court stressed, in the context of the death penalty, the deference which a court should give a legislature's judgment. *See* 428 U.S. at 174–76, 96 S.Ct. at 2925–26. The Court reaffirmed the proposition that it is particularly within the province of the legislature to respond to the moral values of the community and to determine the appropriate degree of punishment, including the death penalty, for certain classes of offenses. Because of the complexity of determining the need for the death penalty, the Court found that the decision to authorize capital punishment for some classes of crimes was one that was best left to the legislature unless "clearly wrong." *See id.* 428 U.S. at 187–88, 96 S.Ct. at 2931. Although the issue in *Gregg* was whether the legislature's decision to impose the death penalty violated the eighth amendment because of the severity of the punishment, the degree of deference which the Court's "clearly wrong" test accorded the legislative judgment convinces us that the due process and equal protection clauses do not require a higher level of scrutiny for legislative classifications that may result in the death penalty. Thus, Gray's claims are to be assessed under a rational basis test.

The basis of Gray's claim under both equal protection and due process is that there is no rational basis for imposing the death penalty on people who commit murder during the course of a felony but not imposing it on people who commit especially atrocious simple murders. However, Mississippi could have rationally decided that felony murders pose a problem different from atrocious simple murders and could have sought to cure the felony murder problem first. Alternatively, the legislature could have decided that the death penalty would be more effective in deterring felony murders since an experienced felon is more likely to assess the consequences of his acts. Conversely, it could have rationally determined that the death penalty might not effectively deter atrocious simple murders since such people are likely as a group to act on passion or impulse and thus be unmindful of the consequences of their crime. In short, the legislature could have rationally decided that the one class of murders either presented a different problem from the other or that the death penalty would be a more effective deterent to felony murders than atrocious simple murders.

Third, Gray argues that under the Mississippi statute a defendant convicted of a felony murder will "automatically" be eligible for the death sentence since one of the aggravating factors, commission of a murder in the course of a felony, will have already been proved. He argues that if a defendant is convicted of a nonfelony murder, the state is still required to prove aggravating circumstances at the sentencing phase. He claims that because this disparity leads to the possibility that defendants convicted of felony murder will receive a

disproportionately higher number of death sentences, it violates the eighth amendment. *See State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551, 568 (1979).

[26] This argument assumes that to meet constitutional muster the death penalty must be imposed proportionately among the aggravating factors established by the state. This argument, however, misperceives the eighth amendment's requirements. The constitutional defect identified in *Furman v. Georgia* was the arbitrary imposition of the death penalty among similarly situated defendants. Because each aggravating factor normally identifies a particular class of defendants, *Furman* and *Gregg* only require that the death penalty be consistently imposed within that class. They do not require that the death penalty be equally distributed among discrete classes of defendants.

[27] Fourth, Gray complains that he was sentenced to death on the basis of an unconstitutionally vague aggravating factor, that the offense was especially heinous, atrocious or cruel. *See* Miss.Code Ann. § 99-19-101(5)(h). In *Gregg v. Georgia*, however, the Supreme Court upheld a similar aggravating factor as facially valid. *See* 428 U.S. at 201, 96 S.Ct. at 2938. The Court noted that while the factor could be construed broadly to encompass almost any murder, there was no reason to assume that the state supreme court would adopt such a construction. In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Court later reversed the imposition of a death sentence based solely on this factor. The Court reasoned that this factor had been applied to include an impermissibly large number of cases. It noted that because Godfrey's "crime cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder," the presence on this factor failed to provide any "principled way to distinguish [*Godfrey's*] case in which the death penalty was imposed, from the many cases in which it was not." *Id.* 100 S.Ct. at 1767. While *Gregg* indicates that Mississippi's aggravating factor is facially valid, *Godfrey* shows that its application may render it unconstitutionally vague.

In the case at bar, Gray does not argue that Mississippi has adopted an open-ended construction of this factor. Indeed, Mississippi has consistently applied a limiting construction to this factor. *See Coleman v. State*, 378 So.2d 640, 648 (Miss.1979). In *Coleman*, the Mississippi Supreme Court reiterated that this factor applied only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Moreover, Gray does not contend that the application of this factor to his case was improper. It would indeed be difficult to argue that abducting a three-year-old child, sexually molesting her, entombing her half-alive in a car trunk and then tossing her out to drown in a river is not especially heinous, atrocious, or cruel. Because Gray has not shown that Mississippi has either adopted an open-ended construction of this factor or applied it in an open-ended manner and because the Court has applied it properly to date, we reject his claim.

Fifth, Gray argues that once an aggravating factor is established by the state, the burden of proof is impermissibly shifted to the defendant. Gray contends that to avoid the death penalty, the defendant must show that the mitigating factors outweigh the aggravating factors. Gray argues that this allocation of proof creates an unconstitutional presumption of death.

[28-31] Gray's argument, however, is based on a misapprehension of the applicable state law. Section 99-19-103 of the Mississippi Code provides that the jury may not impose the death penalty unless it finds that at least one statutory aggravating circumstance exists and that the aggravating circumstances are not outweighed by the mitigating circumstances. *See* Miss.Code Ann. § 99-19-103. The burden of proving an aggravating circumstance exists as part of the prosecution's general bundle. *Gray v. State*, 351 So.2d 1342, 1345 (Miss.1977) (appeal from Gray's first trial). The defendant is *permitted* but not required to *offer* any relevant mitigating circumstances not encompassed in the prosecutor's presentation. No burden of proof or persuasion is assigned, just as the defendant's option to

develop proof of alibi, good character, or, in this case, mental instability does not operate to shift the burden of proof, so the choice to present any number or kind of mitigating circumstances does not. Moreover, even if the jury finds that the aggravating circumstances outweigh the mitigating circumstances, it is not required to impose the death penalty. It may still sentence a defendant to life imprisonment. *See Coleman v. State*, 378 So.2d 640, 647 (Miss.1979). Thus, the statutory procedures act only to require the prosecution to build the aggravating circumstance bridge the jury must cross to be entitled to impose the death penalty. *Cf. Stephens v. Zant*, —— U.S. ——, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982). They do not limit its ability to impose a life sentence. Every mandatory element of proof is assigned to the prosecution. Neither the burden of production nor the burden of proof ever shifts to the defendant.[16]

[32] Sixth, Gray argues that by authorizing the introduction of any evidence that is relevant to the sentencing process, the state introduces a substantial possibility that the death sentence will be imposed for reasons other than those enumerated in the eight aggravating circumstances. *See* Miss. Code Ann. § 99-19-101(1). Gray does not argue that any evidence was improperly admitted at his trial because of this provision. Instead, he claims that the sentencing procedure is invalid on its face since it fails to channel the jury's discretion. Gray's claim is frivolous. The Mississippi Supreme Court has construed this provision to allow the admission of only that evidence which is relevant to the enumerated aggravating factors. *See Coleman v. State*, 378 So.2d 640, 648 (Miss.1978). Because Gray has not shown that the statute is unconstitutional on its face or as applied, we reject his claim.

[33] Seventh, Gray contends that Mississippi violates the equal protection and due process clauses by denying capital defendants the right to a presentence report which is afforded to all other felons in the state. Gray does not claim that he was denied access to a presentence report which the jury relied on in imposing the death sentence. *See Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Instead, his claim turns on the fact that the state does not prepare a presentence report for capital defendants.

Because capital defendants are not a suspect class and because the right to a presentence report is not fundamental, Mississippi's practice is invalid only if it fails the minimum rationality standard. *See Arceneaux v. Treen*, *supra*. Mississippi might rationally conclude that a capital defendant's ability to present all relevant mitigating evidence at the sentencing phase of his trial would remove any need for a presentence report. We reject his claim.

[34] Eighth, Gray argues that Mississippi fails to provide any standard for the jury in weighing the aggravating factors against the mitigating factors and fails to provide that the prosecution bears the burden of production and proof on these issues. The first part of Gray's claim is frivolous. Mississippi prevents a jury from imposing the death penalty if the mitigating factors outweigh the aggravating factors. Mississippi also allows every jury that unique discretion only juries possess in our system of law to decline to impose the death penalty though a hundred other panels might properly find it mandated. Moreover, its statutes comport completely with those found facially valid by the Supreme Court. *See Gregg v. Georgia*, 428 U.S. at 193, 203, 96 S.Ct. at 2934-35, 2939.

16. The trial judge's instructions carefully adhered to this distinction. He advised the jury

> you shall weigh the aggravating circumstances, if any, and the mitigating circumstances, if any, one against the other, and in the event that you find that the aggravating circumstances outweigh the mitigating circumstances you *may* impose the death sentence, but should you find that the mitigating circumstances overcome the aggravating circumstances, then in that event, you *shall not* impose the death sentence. (emphasis added).

The trial judge's careful use of "may" and "shall not" indicates that a finding that the aggravating circumstances outweigh the mitigating circumstances allows, but does not require the jury to impose the death penalty.

[35] The second part of Gray's claim, that the Mississippi statute does not provide that the prosecution bears the burden of proof, also lacks merit. As noted, the Mississippi Supreme Court has construed its capital punishment statute to place the burden of proving any aggravating circumstances on the prosecution. *See Gray v. State*, 351 So.2d 1342, 1345 *supra*. This is the critical burden since the jury's failure to find an aggravating circumstance precludes it from imposing the death penalty. *See* Miss.Code Ann. § 99-19-103.

[36] Ninth, Gray argues that the jury should be required to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before it can impose the death penalty. This states the rule too strongly. While Mississippi requires that jurors find the existence of each aggravating circumstance beyond a reasonable doubt, the jury may return the death penalty if the aggravating circumstances are not outweighed by the mitigating circumstances. This allocation of proof accords with the capital sentencing procedures which the Court has upheld as facially valid. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). We therefore reject Gray's claim.

2. Voluntariness of Gray's Confessions

[37] Gray claims that the inculpatory statements which were introduced at trial were obtained by threatening him and depriving him of sleep. The determination of whether Gray's confession was voluntary presents a mixed question of law and fact and may be assessed independently by this court.[17] *See Sumner v. Mata*, —— U.S. ——, ——, 102 S.Ct. 1303, 1305, 71 L.Ed.2d 480 (1982) (per curiam). However, in assessing the voluntariness of his confession we presume that the underlying facts found by the state court are correct unless shown otherwise. *See id.; Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

[38] Gray's claim that his confession resulted from threats obviously turns in the first instance on the factual issue of whether any threats occurred. At the hearing on the motion to suppress his confession, Gray testified that he had been threatened three times by one of the officers, McIlrath. Gray alleged that, as they were leaving the police station to go to the jail, McIlrath threatened to beat him up if he did not take the police to Derissa Scales. When they got to the jail, they entered an elevator to go to the fourth floor. Gray claimed that McIlrath stopped the elevator between floors and threatened to beat in his face with the jail keys unless he led the police to Scales. After Gray agreed to take the police to Scales, Gray claims that McIlrath told him that if they failed to find the little girl, Gray wouldn't come back.

Both McIlrath and another officer who had been present testified that they had neither threatened Gray nor offered him any help to induce him to tell them where to find the little girl. They testified that Gray was frightened that once he was put in jail he would not get out again. They claimed that in the elevator on the way up to the jail, Gray spontaneously offered to lead them to the child to avoid being put in jail.

Although the trial court judge did not articulate the factual basis of his denial of Gray's motion to suppress, the state supreme court found:

> A further statement of the Miranda warnings was given to Gray, but a brief preliminary interrogation [proved] to be unfruitful. However, as the officers and Gray were ascending in the elevator,

17. *Pullman-Standard v. Swint*, —— U.S. ——, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), established that ultimate facts as well as subsidiary facts are to be reviewed under a clearly erroneous standard. It expressly excepted, however, mixed questions of law and fact from its consideration. *See id.* at ——, 102 S.Ct. at 1791-92 n.19. It noted that there is "support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court ...." *Id.*

> Gray spontaneously said, "If I take you to her will you help me?" No offer of help was made to Gray but he offered to take the officers to where he had left Derissa. Needless to say, this offer was accepted and Gray and the officers entered an automobile to be directed by Gray to the place where he had left the child.

Gray v. State, 375 So.2d at 996. The state court obviously accepted the officer's version of the events and rejected Gray's testimony.[18] Gray has not articulated any reason to reject the state court's finding that Gray spontaneously offered to lead the officers to Derissa Scales, nor are we aware of any. *See Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); *Branch v. Estelle*, 631 F.2d 1229, 1232–33 (5th Cir. 1980). Because we are bound by the state court's resolution of this pure credibility fact issue, Gray's renewed claim that his confession resulted from the officer's threats is frivolous.

[39] Gray's claim that the statement was the result of a lack of sleep, also lacks merit.[19] On the day Derissa Scales disappeared, the police found Gray around midnight at a fast food restaurant where his girlfriend worked. When Gray offered to take the police to find Derissa Scales, the police set out immediately and discovered her body about 4:30 in the morning. After the body was recovered, Gray was returned to the police station and given *Miranda* warnings. Gray made an oral statement at that time and signed a copy of the statement the next afternoon. Gray testified at the motion to suppress that, except for the three alleged threats made by McIlrath, his subsequent statements were made freely and voluntarily. *See Gray v. State*, 375 So.2d at 1001. Given Gray's testimony, we cannot say that any lack of sleep vitiated the voluntariness of his confessions.

3. Method of Jury Selection

[40] Gray claims that the method of jury selection used by the State of Mississippi violated the sixth and fourteenth amendments because his counsel were not able to inquire adequately into the attitudes of prospective jurors. Because Gray notes that this inquiry is indispensable when a defendant's life is at stake and cites *Witherspoon v. Illinois*, *supra*, it would appear that the basis of his claim is that the method of jury selection prevented his counsel from adequately determining prospective jurors' views on the death penalty.

Under the jury selection process used by the trial court, the prospective jurors were addressed as a group. The trial judge asked whether any jurors had scruples against the death penalty. Those that responded affirmatively were then questioned further to determine the extent of their objection. Because both counsel were allowed an unlimited opportunity to question the jurors who indicated that they had some scruples against imposing the death penalty, Gray's objection cannot be leveled against this stage of the proceeding. Gray's claim must therefore be that the initial inquiry was insufficient to reveal all jurors who had scruples against the death penalty. This claim is frivolous.

To the extent that this method of jury selection fails to reveal jurors who oppose the death penalty, a defendant is aided. Because these prospective jurors remain in the jury pool, there is a greater chance that jurors opposed to the death penalty will serve on the petit jury. There is thus no indication that the use of this jury selection method prejudiced Gray's interests.

18. In upholding the trial court's decision not to suppress Gray's confession, the state supreme court noted Gray's allegations that he had been threatened. The court found, however, that Gray's subsequent statement was clearly voluntary. Although the court's holding turned on several considerations, implicit in that holding was a rejection of Gray's version of the events leading to his confession, a conclusion which the court had already made clear in its earlier recitation of the facts. *See Gray v. State*, 375 So.2d at 1001.

19. Although Gray's claim on this ground was waived by a failure to raise it at the motion to suppress, *see Gray v. State*, 375 So.2d at 1001, the state failed to raise a *Wainwright v. Sykes* argument before the district court or this court. Because the state has waived its *Wainwright* objections, we reach the merits of Gray's claim. *See Washington v. Watkins*, 655 F.2d at 1368.

4. Failure to Instruct on a Lesser-Included Offense

[41] Gray argues that the fourteenth amendment was violated because the jury was not permitted to consider a lesser included offense. *See Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). In the case at bar, Gray's counsel requested an instruction on the lesser included offense of kidnapping, which was given. Gray's counsel did not, however, request that the jury be instructed on any other lesser offense.

Even if it were possible to have given an instruction on another lesser included offense, Gray is barred from raising this issue on habeas. Under state law, Gray's failure to request an instruction on another lesser included offense precluded him from later raising that point. *See Newell v. State*, 308 So.2d 71, 78 (Miss.1975). Because an independent and adequate state procedural ground exists for denying Gray's claim, he cannot raise it on habeas absent a showing of cause and prejudice. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981). Because Gray has shown neither, the state's independent procedural ground bars our review of his claim.

5. The Construction of the Aggravating Circumstances

Gray argues that the four aggravating circumstances found in his case have been interpreted in such a broad manner that there is no way to distinguish those cases where the death penalty has been imposed from those where it has not. The four aggravating circumstances found to exist are: i) that the murder was committed under a sentence of imprisonment; ii) that the murder was committed during the course of a kidnapping; iii) that the murder was committed for the purpose of avoiding or preventing the detection or lawful arrest of the defendant; and iv) that the murder was especially heinous, atrocious or cruel.

[42, 43] Gray claims that because the first factor, that the murder was committed under a sentence of imprisonment, is susceptible of widely divergent interpretations, it is vague in violation of *Grayned v. Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). In evaluating a vagueness challenge to a state law, we are required to consider the law in light of the state court's interpretation of it. *See Village of Hoffman Estates v. Flipside*, — U.S. —, 102 S.Ct. 1186, 1191 n.5, 71 L.Ed.2d 362 (1982).

Gray concedes that this first factor clearly covers murders committed while a defendant is physically imprisoned and that the Mississippi Supreme Court has "sanctioned [its] application to a person on parole at the time of the murder." *See Gray v. State*, 375 So.2d at 1005. We fail to understand how the state could have more clearly defined this factor nor do we see any danger of arbitrary application. Gray's claim is completely without merit.

In attacking the second aggravating circumstance, that the murder was committed during the course of a kidnapping, Gray admits that he restates an earlier argument, and that this factor was proven when he was convicted of felony murder at the trial stage. We have already considered this argument and have rejected it.

[44] Gray's attack is directed primarily at the third aggravating factor. He claims that because the trial judge's instructions differed from the statutory definition, the jury was permitted to base its imposition of the death sentence on a nonstatutory aggravating circumstance. Section 99-19-101(5)(e) of the Mississippi Code provides that murder committed "for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" constitutes an aggravating circumstance. *See* Miss. Code Ann. § 99-19-101(5)(e). In this case, the trial judge instructed the jury that this factor could be found if the murder "was committed for the purpose of avoiding or preventing the detection and lawful arrest of the Defendant . . . ."

Although the first part of this aggravating circumstance might have been interpreted to apply only to a murder committed while a defendant was being pursued by a policeman, the trial judge interpreted this circumstance to apply to the murder of a

witness to a crime to avoid detection. The state supreme court accepted the trial court's construction of this factor. The court stated "Upon the entire record, the jury was justified in finding beyond a reasonable doubt that the child had been killed by Gray intentionally and maliciously for the purpose of silencing her outcries or preventing the report by her of acts of molestation." *Gray v. State*, 375 So.2d at 1004.[39] The Mississippi courts' interpretation of that state's statute is definitive and controlling. The jury was not allowed to impose the death sentence on the basis of a non-statutory factor.

[45] The question which remains, however, is whether this aggravating circumstance has been interpreted so broadly that it fails to offer a meaningful distinction between those cases where the death penalty may be imposed and those where it may not. *See Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Gray argues that the state court's interpretation of this factor impermissibly renders it applicable to all murders, since every murderer silences his victim and thus is aided in evading or preventing arrest. We do not think, however, that Mississippi has adopted such a broad construction. The court has construed this aggravating circumstance to refer to purposefully killing the victim of an underlying felony to avoid or prevent arrest for that felony. Like the murder of a clerk who has delivered the cash to the gunman who robs her, the state supreme court noted that Gray purposefully killed Derissa Scales to prevent her from reporting that he had indulged his repulsive sexual aggressions on her little body. As such, this factor merely achieves the state's interest in protecting victims of felonies from being killed to prevent the felon's detection. This construction is not so broad that it comprehends an impermissibly large group of murderers. *See Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Riley v. State*, 366 So.2d 19, 22 (1979) (per curiam).

[46] Gray claims that the fourth aggravating factor, that the murder is especially heinous, atrocious or cruel has never been construed by the state supreme court. This claim, however, is incorrect. *See Coleman v. State*, 378 So.2d 640, 648 (1978).

Gray also claims that this factor has been inconsistently applied and contrasts *Irving v. State*, 361 So.2d 1360 (Miss.1978), *cert. denied*, 441 U.S. 913, 99 S.Ct. 2014, 60 L.Ed.2d 386 (1979), with *Voyles v. State*, 362 So.2d 1236 (Miss.1978), *cert. denied*, 441 U.S. at 956, 99 S.Ct. 2184, 60 L.Ed.2d 1059 (1979). On its face, Gray's argument appears meritorious since *Voyles* involved a particularly gruesome murder and *Irving* involved the killing of a victim by a single shotgun blast. The difficulty with Gray's argument, however, is that *Irving*, as it is presented by the state supreme court, did not rely on the fact that the murder was especially heinous, atrocious or cruel. The two aggravating circumstances which the court noted were that Irving had committed the murder during the course of a robbery and that he had a prior criminal record. *See* 361 So.2d at 1371, 1372. The factual basis of Gray's argument is thus incorrect.

Moreover, we note that the state supreme court has consistently applied this factor to pitiless crimes which are unnecessarily torturous to the victim. *See Reddix v. State*, 381 So.2d 999 (Miss.) (elderly man beaten to death with iron wrench), *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980); *Jones v. State*, 381 So.2d 983 (Miss.) (same), *cert. denied*, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980); *Culbertson v. State*, 379 So.2d 499 (Miss.1979) (man knocked to ground with stick and shot while begging for mercy), *cert. denied*, 449 U.S. 986, 101 S.Ct. 406, 66 L.Ed.2d 250 (1980); *Voyles v. State*, 362 So.2d 1236 (Miss.1978) (woman beaten, run over twice with car and thrown in creek). The only arguable exception to the consistent application of this factor has been *Washington v. State*, 361 So.2d 61 (Miss.1978), *cert. denied*, 441

39. Gray's trial marked the first time that this aggravating circumstance had been relied on or construed by the Mississippi courts.

Cite as 677 F.2d 1111 (1982)

U.S. 916, 99 S.Ct. 2016, 60 L.Ed.2d 388 (1979). In *Washington* the defendant robbed a convenience store and shot the clerk while leaving the store. Although the murder was cold blooded, it was arguably not a "pitiless crime which is unnecessarily torturous to the victim." *See Coleman v. State*, 378 So.2d at 648. We note that *Washington* was the first case to apply this factor and was decided before *Godfrey v. Georgia*, *supra*. Even if *Washington* construed this term too broadly, there is every indication that the state supreme court has refined its views, applied this term consistently since then, and will continue to do so. *See Coleman v. State*, 378 So.2d at 650 (invalidating death penalty because penalty was disproportionate to that imposed in similar cases).

6. Comparative Review

[47] Gray claims that the Mississippi Supreme Court's comparative review of death sentences is flawed since the court only compared Gray's case with those cases where the death sentence had been imposed and not with all the cases where it could have been imposed. Because the Supreme Court has rejected a similar argument in *Proffitt v. Florida*, 428 U.S. 242, 258–59 & n.16, 96 S.Ct. 2960, 2969–70 & n.16, 49 L.Ed.2d 913 (1976), we reject this claim as well.

Gray received constitutional assistance of counsel in his trial before a lawfully chosen jury. He was sentenced to death for his crime under statutory and decisional procedures which contain no constitutional deficit. He is not entitled to federal habeas corpus relief from the due execution of the sentence imposed and affirmed on review by the courts of Mississippi.

AFFIRMED.

JAMES R. SNYDER COMPANY, INC., Ebeling & Hicks, Inc., Clarence Gleeson, Inc., and Leo J. Vendervennet & Sons, Inc., Plaintiffs-Appellants, Cross-Appellees,

v.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, DETROIT CHAPTER, INC., Barton-Malow Co., Darin & Armstrong, Inc., R. E. Dailey & Co., Thomas E. Dailey, A. Z. Shmina & Sons Co., Detroit Building Employers Labor Council, Stanley E. Veighey, John W. Lanzetta, Frank D'Agostino and John McCoy, Defendants-Appellees, Cross-Appellants.

Nos. 80-1030, 80-1031.

United States Court of Appeals, Sixth Circuit.

Argued Feb. 11, 1981.

Decided April 29, 1982.

Cross appeals were taken from order of the United States District Court for the Eastern District of Michigan, James P. Churchill, J., entered in action alleging antitrust conspiracy. The Court of Appeals, Engel, Circuit Judge, held that: (1) evidence that unions sought same wages from two sets of employers was not sufficient to prove conspiracy between unions and one employer group, and (2) there was insufficient evidence of predatory intent.

Affirmed.

1. Federal Courts ⇐=206

The district court had Sherman Act jurisdiction where there had been a substitution of purchasers of goods from interstate commerce. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Evidence ⇐=253(1)

The preponderance of evidence standard should be used to determine admissibility of out-of-court statements by alleged coconspirators in civil as well as criminal cases.

port his conviction. Inspection of the record reveals, however, that it was; and since for the reasons stated his other points for reversal are without merit, the judgment is

AFFIRMED.

Danny L. GRIFFIN, Plaintiff-Appellant,

v.

OCEANIC CONTRACTORS, INC., Defendant-Appellee.

No. 80-1599.

United States Court of Appeals, Fifth Circuit. Unit A

Aug. 25, 1982.

Appeal from the United States District Court for the Eastern District of Texas.

Friedman & Chaffin, Robert A. Chaffin, Houston, Tex., for plaintiff-appellant.

Fulbright & Jaworski, Theodore Goller, Houston, Tex., for defendant-appellee.

Before BROWN, POLITZ and TATE, Circuit Judges.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:

The judgment of this Court, affirming the decision of the district court, 664 F.2d 36 (5th Cir. 1981), having been reversed in part by the Supreme Court and the case having been "remanded for proceedings consistent with this opinion," ___ U.S. ___, 102 S.Ct. 3245, 73 L.Ed.2d ___ (1982), this case is now remanded to the district court for further proceedings consistent with the opinion of the Supreme Court.

REMANDED.

Jimmy Lee GRAY, Petitioner-Appellant,

v.

Eddie LUCAS, Warden, et al., Respondents-Appellees.

No. 81-4018.

United States Court of Appeals, Fifth Circuit.

Sept. 3, 1982.

The United States District Court for the Southern District of Mississippi, at Biloxi, William Harold Cox, J., denied state prisoner's petition for habeas corpus, and prisoner appealed. Following affirmance, 677 F.2d 1086, defendant filed petition for rehearing and suggestion for rehearing en banc. The Court of Appeals held that: (1) where killing by defendant was for intentional purpose of avoiding arrest, it was not necessary to reach question of whether capital punishment for unintentional killing would comport with Eighth Amendment standards; (2) reasonable doubt standard has no application to weighing of aggravating and mitigating circumstances; and (3) Mississippi Supreme Court construction of capital murder statute eliminates risk that death penalty will be inflicted in an arbitrary and capricious manner.

Petitions denied.

1. Criminal Law ⇐1134(3)

Taking human life for deliberate and particular purpose, such as to avoid arrest, is necessarily intentional murder, and thus where jury found beyond a reasonable doubt that defendant killed victim for purpose of avoiding arrest, it was unnecessary to consider whether capital punishment for unintentional killing under Mississippi statute would comport with Eighth Amendment standards. Miss.Code 1972, § 97-3-19(2)(e); U.S.C.A.Const.Amend. 8.

2. Criminal Law ⇐1208(1)

Reasonable doubt standard has no application to weighing of aggravating and mitigating circumstances in death penalty case.

3. Habeas Corpus ⇐90

Where state trial court made a credibility choice, federal court was bound by that choice in habeas corpus proceeding.

4. Homicide ⇐354

Mississippi Supreme Court's construction of provision in capital murder statute that one aggravating circumstance to be considered is whether murder is especially heinous, atrocious or cruel was sufficient to eliminate risk that death penalty would be inflicted in arbitrary and capricious manner. Miss.Code 1972, § 99-19-101(5)(h).

Richard E. Shapiro, New Orleans, La., Albert Sidney Johnston, Jr., Biloxi, Miss., for petitioner-appellant.

Billy L. Gore, Asst. Atty. Gen., Jackson, Miss., for respondents-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(677 F.2d 1086 (5th Cir. 1982))

Before CLARK, Chief Judge, THORNBERRY and GARZA, Circuit Judges.

PER CURIAM:

In affirming the district court's denial of Jimmy Lee Gray's habeas corpus petition, we decided several issues raised by Gray that had not been addressed in the district court's opinion. Gray raises four of these issues again in this petition for panel rehearing, alleging that his initial presentation was not complete. We have reconsidered each of these questions in light of Gray's supplemented arguments but still find them to be without merit. His petition is denied.

I.

[1] Gray was convicted of capital murder under Miss.Code Ann. § 97-3-19(2)(e). That statute applies by its terms to both intentional and unintentional killings that occur during the commission of certain felonies. Therefore, Gray argues that we must address the ticklish question whether capital punishment for an unintentional killing comports with eighth amendment standards.

We disagree. It is undisputed that at the sentencing phase of Gray's bifurcated trial the jury found beyond a reasonable doubt that Gray had killed Derissa Scales for the purpose of avoiding arrest. This finding is equivalent to a finding of intent. Taking a human life for a deliberate and particular purpose, such as to avoid arrest, is necessarily intentional murder. For this reason we affirm our earlier conclusion that we need not reach the "difficult question of constitutional law" posed by capital punishment for an unintentional killing. 677 F.2d at 1103.

II.

[2] Gray's second contention is that, in sentencing him, the jury should have been required to find beyond a reasonable doubt that the attendant aggravating circumstances outweighed the mitigating circumstances. On this point we are persuaded by the reasoning of our sister circuit, which recently addressed this issue.

> [This argument] seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, the relative *weight* is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.

Ford v. Strickland, 676 F.2d 434, 442 (citations omitted), *reh'g en banc granted*, 676

F.2d 456 (11th Cir. 1982). The reasonable doubt standard simply has no application to the weighing of aggravating and mitigating circumstances.

III.

[3] Gray also alleges that we erred in failing to make an independent determination of the voluntariness of his confession. In our prior opinion we found that the state court rejected Gray's allegation that his confession was coerced and that we were bound by this factual determination. Gray's position here is that the state court did not disbelieve his allegation that he was threatened but rather found the threats insufficient to render his confession involuntary. Therefore, he argues that it is our duty to determine, under his version of the facts, whether the confession was voluntary.

We disagree with Gray's interpretation of the state court's opinion and adhere to our prior opinion, in which we stated: "Although the [state] court's holding [that the confession was voluntary] turned on several considerations, implicit in that holding was a rejection of Gray's version of the events leading to his confession, a conclusion which the court had already made clear in its earlier recitation of the facts." 677 F.2d at 1108 n.18. The state court's recitation of the facts completely omits Gray's allegation that his confession was coerced by threats. It is obvious that the court made a credibility choice and rejected Gray's version. We are bound by this choice.

IV.

[4] Miss.Code Ann. § 99-19-101(5)(h) provides that one aggravating circumstance to be considered by a jury in the sentencing phase of a capital murder trial is whether the murder was especially heinous, atrocious, or cruel. Gray contends that the Mississippi Supreme Court has never adopted a constitutionally permissible construction of that statute.

Again, we disagree. In *Coleman v. State*, 378 So.2d 640 (Miss.1978), the Mississippi Supreme Court construed § 99-19-101(5)(h) by quoting from this court's opinion in *Spinkellink v. Wainwright*, 578 F.2d 582, 611 (5th Cir. 1978): "What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—*the conscienceless or pitiless crime which is unnecessarily torturous to the victim.*" 378 So.2d at 648 (emphasis added by the state court). This construction clearly eliminates the risk that the death penalty will be inflicted in an arbitrary and capricious manner. *See Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The other issues Gray raises in his petition for panel rehearing were fully briefed by the parties and given plenary treatment in our prior opinion. Further consideration of them is unnecessary.

Gray's petition for panel rehearing is

DENIED.

Gray's petition for panel rehearing was accompanied by a suggestion for rehearing en banc. No member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Fed.R.App.P. 35; Local Fifth Circuit Rule 16), this suggestion is

DENIED.

Supreme Court of the United States

No. A-462

JIMMIE LEE GRAY,

Petitioner,

v.

EDDIE LUCAS, WARDEN AND ATTORNEY GENERAL OF MISSISSIPPI

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner~~(s)~~,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 31, 19 83.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 23rd day of November, 19 82

§97-3-19. Homicide--murder defined--capital murder.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriff of counties and their deputies, constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

§97-3-21. Homicide--penalty for murder or capital murder.

Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the state penitentiary.

Every person who shall be convicted of capital murder shall be sentenced to death or to imprisonment for life in the state penitentiary.

§99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in sub-

sections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life improsonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

§99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing; effect of jury's failure to agree on punishment.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

§99-19-105. Review by supreme court of impositon of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

No. 82-6172

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JIMMY LEE GRAY,

Petitioner,

vs.

EDDIE LUCAS, WARDEN AND THE ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should certiorari be granted to consider whether the Eighth and Fourteenth Amendments require the sentencer in a death penalty case to find beyond a reasonable doubt that the aggravating circumstances outweigh any mitigating factors proffered for consideration?

II.

Should certiorari be granted to determine whether the Sixth Amendment requires in capital cases a heightened standard for effective assistance of counsel and, more particularly, a greater duty of counsel to investigate and prepare for trial?

III.

Should certiorari be granted when the petitioner has wholly failed to properly raise and preserve any Eighth and Fourteenth claim concerning the prosecution's interjection at sentencing of petitioner's future dangerousness?

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No. 82-6172

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JIMMY LEE GRAY

Petitioner,

vs.

EDDIE LUCAS, WARDEN and THE ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

I. PREFACE

Petitioner, Jimmy Lee Gray, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the panel decision dated June 10, 1982, and the order denying a petition for panel rehearing and suggestion for rehearing en banc dated September 3, 1982.

II. OPINIONS BELOW

Court of Appeals. The panel decision of the Court of Appeals is reported as Gray v. Lucas, 677 F.2d 1086 (5 Cir. 1982). The per curiam opinion of the Court of Appeals denying panel rehearing and rehearing en banc is reported as Gray v. Lucas, 685 F.2d 139 (5 Cir. 1982).

District Court. The opinion of the United States District Court for the Southern District of Mississippi denying Gray's writ of habeas corpus is unreported. See Gray v. Lucas, Civil Action No. S80-0564 (C) (S.D. Miss. November 26, 1980).

State Court. The opinion of the Supreme Court of Mississippi upholding on direct appeal Gray's capital murder conviction and the sentence of death imposed in its wake is reported as Gray v. State, 375 So.2d 994 (Miss. September 26, 1979) (en banc), cert. denied 446 U.S. 988 (June 2, 1980).

III. JURISDICTION

Petitioner seeks to invoke the appellate jurisdiction of this Court by way of a Petition for Writ of Certiorari drawn and presented under the authority granted in 28 U.S.C. § 1254(1). Respondents do not take issue with petitioner's jurisdictional statement.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately identified and set forth the constitutional and statutory provisions involved in this cause.

V. STATEMENT OF THE CASE

Petitioner, on former days, received bifurcated trials by jury in the Circuit Court of Jackson County, Mississippi. Gray's first trial was adjudicated in two stages as required by Jackson v. State, 337 So.2d 1242 (Miss. October 5, 1976), which held ". . . that Mississippi's ["mandatory"] death penalty statute [was] constitutional as construed and implemented by [the Jackson] opinion and that it satisfie[d] the concerns expressed in Furman [v. Georgia] and the other recent cases." 337 So.2d at p. 1256.

The Mississippi Supreme Court reversed petitioner's first conviction, finding reversible error in both the guilt-finding and sentence-determining phases of the bifurcated trial. Gray v. State, 351 So.2d 1342 (Miss. November 16, 1977).

At the sentencing phase of Gray's second trial conducted under statutory bifurcation in April, 1978, before the same jury fixing guilt, the State relied upon the testimony and exhibits admitted upon the trial of the guilt-finding phase. It also introduced a copy of the judgement and sentence of the Superior Court

of Arizona, certified according to the Act of Congress, in the case of State of Arizona v. Jimmy Lee GRAY, No. 5144, showing that petitioner, pursuant to a plea of guilty, had been previously sentenced to serve not less than twenty (20) years nor more than the term of his natural life, on March 7, 1968, for the crime of second degree murder.

Gray did not testify at the sentencing phase but did introduce a psychological evaluation report dated July 17,1969. This report was prepared under the auspices of the Arizona State Prison, Psychological Department, Florence, Arizona. Petitioner also relied upon prior testimony adduced during the guilt phase of the trial and thereafter rested his case.

In rebuttal, the State produced psychologist, Charlton Stanley, an employee of the Mississippi State Hospital at Whitfield, Mississippi. The substance of Dr. Stanley's testimony is reflected in the state court opinion reported in 375 So.2d 994, 1003 (Miss. 1979).

At the close of the sentence-determining phase the trial court granted Instruction No. C-15. Submitted for the jury's consideration as possible aggravating factors were the following four statutory aggravating circumstances:

> 1. The Murder of Deressa Jean Scales was committed by the Defendant, Jimmy Lee Gray, while the said Defendant was under a sentence of life imprisonment by the Superior Court of the State of Arizona, County of Yuma, imposed on the 7th day of March, 1968, in Cause number 5144 of the said Court.
>
> 2. The Capital Murder was committed while the Defendant was engaged in the commission of the crime of kidnap,
>
> 3. The Capital Murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of the Defendant, and
>
> 4. The commission of the Capital Murder in this case was especially heinous, atrocious, or cruel.

The trial judge also granted Instruction No. C-16. Submitted for the jury's consideration in a mitigating context where the following:

> 1. The offense was committed while the Defendant was under the influence of extreme

mental or emotional disturbance.

2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. Any other matter brought before you which you deem to be mitigating on behalf of the Defendant.

The jury retired from the courtroom to deliberate at 4:10 p.m. and returned a verdict of death at 5:45 p.m. That verdict reads as follows:

> "We, the Jury, find unanimously after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh or overcome the aggravating circumstances, and that the Defendant should suffer the penalty of death." "We, the Jury, find unanimously beyond a reasonable doubt that the following statutory aggravating circumstances exist in this case, to-wit: Items, 1, 2, 3 and 4 of instruction C-15.
>
> /s/ Charles J. Bridley, Jr.,
> Foreman"

Two attorneys from Pascagoula, Mississippi, (Wright and Heidelberg) were appointed to represent Gray prior to his second trial. During the numerous consultations conducted with their client [E.H. 85-86], trial counsel repeatedly asked Gray if he knew of any witnesses — particularly family members — that he [Gray] would like for them to contact. [E.H. 105, 119-20, 123, 132-33, 136-37] Petitioner was specifically asked about his mother —— a logical starting place —— but Gray did not desire to produce her. [Wright: E.H. 75, 105, 116; Heidelberg: E.H. 119-20] Gray ". . . was very reluctant, as a matter of fact, he didn't want anybody in his family." [E.H. 119] Counsel attempted to contact Gray's brother, a California resident who could not secure sufficient funds to come to Mississippi for the first trial. [E.H. 124-25] They considered producing Gray's girlfriend, but she had left Pascagoula after Gray's arrest and could not be located. [E.H. 89, 120-21, 123, 133] Regardless, Gray did not want either one of them contacted. [E.H. 121, 125] Trial counsel seriously considered calling Detective Biggs who had befriended Gray during his period

of pre-trial incarceration and who "liked Jimmy." [E.H. 104, 119,133]

Heidelberg specifically recalled further efforts. [E.H. 119] He telephoned Ingalls Shipyard in an attempt to locate Gray's former employer and business associates. Petitioner's company, however, had completed its computer programming operations and had returned to Chicago. [E.H. 123] Gray could not provide the names of anyone in Chicago that Heidelberg could talk to. [E.H. 132] Heidelberg also solicited assistance from the Pascagoula Probation and Parole Office, but they could not provide any useful information. [E.H. 133-34] He talked to Fondren about local people, but the only name former counsel could produce was that of Neil Beckham. In Heidelberg's opinion, Beckham —— a mild retardate —— would not have been a good witness. [E.H. 123-24] In short, Gray could not, and did not, provide counsel with any names even though this information was sought on repeated occasions. Heidelberg testified that Gray fully understood the nature of the bifurcated proceedings and ". . . I told him we could bring in almost anything that . . . would help him, but there was nobody that he told us that he really wanted to see or talk to . . ." [E.H. 120] Heidelberg questioned the propriety of using "prison personnel" to impart to the factfinder matters focusing upon Gray's character. [E.H. 136]

The written opinion penned by the Supreme Court of Mississippi in the wake of direct appeal and the opinion of the Court of Appeals precipitated by the denial below of habeas redress contain a fair and accurate recitation of other pertinent facts involved in Gray's quest for plenary review.

On January 16, 1981, the Court of Appeals granted petitioner's application for stay of execution pending final disposition of his appeal to the Fifth Circuit. Respondents did not seek to reset the day of execution following final disposition by the Court of Appeals, and at the present time a new date for petitioner's execution has not been fixed.

VI. REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE STANDARD, IF ANY, BY WHICH AGGRAVATING CIRCUMSTANCES MUST OUTWEIGH ANY MITIGATING CIRCUMSTANCES PROFFERED FOR THE SENTENCER'S CONSIDERATION IS A MATTER OF STATE LAW AND NOT FEDERAL CONSTITUTIONAL LAW.

The first question posed by petitioner is not cert-worthy because the applicable standard, if any at all, by which aggravating circumstances must outweigh mitigating factors at a capital sentencing hearing does not present a substantial federal question implicating the Constitution of the United States. Rather, the question posed involves a matter of state law that should, in all fairness to the individual states, be immune from federal intrusion. Additional reasons for denying plenary consideration of this issue are proffered as follows:

[1] The Opinion Below Was Accurate and Correct. The Court of Appeals for the Fifth Circuit gave full consideration to this matter not only on direct appeal [685 F.2d 1086, 1107] but also in the wake of Gray's petition for rehearing [685 F.2d 139, 140-41]. The opinions penned below are accurate and correct, and the right result was reached.

[2] Complete Unanimity In Federal Circuits Deciding The Question. This issue lacks overall, national importance because there is no present confusion in this area of the law. Admittedly, the question is important to petitioner but only because he has been sentenced to die for his felonious transgression. No conflicts of law presently exist between the federal circuits who have addressed this issue; rather the Fifth, Ninth, and Eleventh Circuit Courts of Appeal are in complete unanimity. Although several states — Mississippi is certainly not one of them — have imposed a reasonable doubt standard in this situation, such is a product of construction of state statutes and not due process demands.

[3] Controlling Principles Settled in Proffitt. Nothing has been shown by this petitioner to warrant re-examination of certain principles that were settled, we opine, in Proffitt v. Florida, 428 U.S. 242 (1976). This Court in Proffitt had under scrutiny a bifurcated death penalty scheme virtually identical to the one adopted in 1977 by the State of Mississippi. It is perfectly clear that Florida did not require application of a reasonable doubt standard to the weighing of aggravating and mitigating circumstances peculiar to sentencing. This Court upheld the constitutional integrity of the Florida statutes. Specifically, the Court found that "[t]he directions given to judge and jury by the Florida statutes are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones." 428 U.S. at p. 258 [emphasis ours]

[4] Natural and Practical Effects of Contrary Results. Petitioner claims that at least seven (7) states ". . . presently require the reasonable doubt standard by statute, court rule, or pattern jury instruction. . ." (Gray's petition at p. 7) If this is true, then a vast majority of the states with death penalty statutes has not applied this standard to the balancing or weighing process required during sentence-determination. Consequently, a result other than the one reached below would have a devastating impact upon the constitutionality of numerous capital sentencing schemes. Both the very natural and practical effects of any new rule of constitutional law would be to create confusion and chaos in the capital sentencing arena and to generate a bloody plethora of post-conviction law suits from death penalty defendants who did not, at their state court trials,receive the benefit of the reasonable doubt standard.

[5] The Result Below Was a Product of Fundamental Fairness. The result reached below was fundamentally fair and flowed in the wake of good faith efforts by Mississippi law enforcement authorities, local prosecutors, the trial court, and the Supreme Court of Mississippi to scrupulously protect the constitutional rights of the defendant. Gray, who had been released on parole from an

Arizona prison after serving only seven (7) years for murder number one, came to Mississippi and within a year of his parole committed murder number two. Gray was twice tried in the Circuit Court of Jackson County, Mississippi, for the murder of the Scale's child. His first conviction and sentence of death was reversed by the Supreme Court of Mississippi on November 16, 1977. [Gray v. State, 351 So.2d 1342 (Miss. 1979)]. His second conviction and sentence of death was affirmed by our Court on September 26, 1979. [Gray v. State, 375 So.2d 994 (Miss. 1978)]. Thus, Gray's guilt and the penalty of death has been fixed below by two dozen Mississippi jurors.

In addition, petitioner's second conviction and sentence of death received plenary review by the Supreme Court of Mississippi on direct appeal. After this Court denied certiorari, petitioner's case was reviewed de novo in a state court post-conviction context. In the wake of a federal habeas petition, an evidentiary hearing was conducted in federal district court. The district court's denial of habeas relief received full consideration by a three judge panel of the Court of Appeals. Both panel rehearing and rehearing en banc were denied. The appellate process has been slow and tedious, but it has been full and fundamentally fair.

Further discussion of these particular points is briefly, but more fully, developed as follows. Section 99-19-101, Mississippi Code 1972 Annotated (1977),[1/] provides, inter alia, that:

* * * * *

> (3) For the jury to impose a sentence of death, it must unanimously find in writing the following:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and
>
> (b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

* * * * *

1/ Petitioner's Appendix D at p. 2.

Thus it is clear the Mississippi statute, much like the Florida law under scrutiny in Proffitt, requires the sentencer imposing a sentence of death to state in writing its unanimous finding "[t]hat sufficient aggravating circumstances exist . . . and [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." Another portion of our statutory scheme —— Section 99-19-103, Mississippi Code 1972 Annotated[2/] —— provides, inter alia, that:

> *****The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed.*****

Under Mississippi law the existence of aggravating circumstance(s) are facts susceptible to proof under a reasonable doubt standard. Stated differently, ". . . the state has the burden to prove, not only the guilt of the defendant, but also to prove aggravating circumstances. . ." Gray v. State, 351 So.2d 1342, 1346 (Miss. 1977). Another procedural safeguard inherent in our statutory scheme is the requirement that the jury unanimously find the existence of one or more aggravating factors before said factor(s) may be relied upon to support a sentence of death. In this posture, a finding by all twelve (12) jurors of the existence, beyond a reasonable doubt, of one or more aggravating factors is the sine qua non of infliction of the death penalty.[3/] Then, and only then, can the jury proceed to the next step involving consideration and weighing of aggravating and mitigating factors. Then and only

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2/ Petitioner's Appendix D at p. 4.

3/ To this limited extent the reasonable doubt standard is applied by the Mississippi sentencer in determining whether a death sentence is the appropriate punishment in a particular case. Such belies petitioner's suggestion that the reasonable doubt standard is totally extraneous to sentence-determination. Nevertheless, proof of existing facts and the weight to be given those facts are horses of entirely different colors. Neither the Eighth nor the Fourteenth Amendment require a reasonable doubt standard, if any standard at all, in assessing the question of weight.

then is the sentencer required to determine whether there are insufficient mitigating circumstances to "outweigh" [§ 99-19-101 (3)(b)] or "overcome" [§ 99-19-103] the aggravating circumstances found unanimously beyond a reasonable doubt.[4/]

This procedure, in our view, fully comports with due process because the requirement that aggravating factors outweigh the mitigating factors before the death penalty can be imposed is not an element of the crime of capital murder in Mississippi. (See Petitioner's Appendix D at pp. 1.) Our state, like Florida, utilizes a bifurcated procedure where the sentence-determining proceeding is a completely separate proceeding conducted only after guilt beyond a reasonable doubt has been established. A mere resemblance between the guilt-finding and sentence-determining phases is not controlling on the question of whether a reasonable doubt standard, or any other standard, should be applied to the ultimate sentencing decision in a capital case. The critical distinction between the two stages is that the first phase of trial focuses solely upon the question of guilt where the State must prove each essential element of the crime charged beyond a reasonable doubt. The second stage, on the other hand, is concerned only with the sentence to be imposed once guilt has been fixed. Gray v. State, 351 So.2d 1342 (Miss. 1977), note 1 at p. 1347.

4/ Under Mississippi law the defendant has no burden of proof with respect to mitigating circumstances. The Supreme Court of Mississippi has said that ". . . one on trial for capital murder must be allowed, at his option, to present mitigating circumstances. Jordan v. State, 365 So.2d 1198, 1206 (Miss. 1978). There is no requirement that the defendant prove the existence of mitigating factors beyond a reasonable doubt or even by a preponderance of the evidence. Rather, the defendant's task is to simply proffer evidence of mitigating circumstances for the sentencer's consideration. The ensuing process of weighing the various aggravating factors against the mitigating ones submitted for consideration ". . . may be hard [but] they require no more line drawing than is commonly required of a factfinder in a lawsuit." Proffitt v. Florida, 428 U.S. at p. 257. Although a reasonable doubt standard is not applied to the weighing process, the sentencer's finding "[t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating [ones]" must be unanimous.

In re Winship, 397 U.S. 358 (1970), relied upon by petitioner, explicitly held ". . . that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at p. 634. We contend that the Due Process rationale of Winship does not apply in Mississippi to the sentencing phase because guilt has already been fixed and the aggravating and mitigating circumstanes are not elements of the crime. Rather, their function is to simply channel the sentencer's discretion in a structured way as required by Furman v. Georgia [citation omitted].

When this Court, six (6) years post-Winship, decided Proffitt, it was well aware that the Florida bifurcated scheme did not require the sentencer to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. Proffitt complained that because Florida law assigned no specific weight to any of the circumstances proffered for the sentencer's consideration, ". . . it [was] not possible to make a rational determination whether there are 'sufficient' aggravating circumstances that are not outweighed by the mitigating circumstances . . ." 428 U.S. at p. 257. In addressing Proffitt's contention with specific rhetoric, this Court opined:

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing

> discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.
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> 428 U.S. at pp. 257-58 [emphasis ours].

The capital sentencing procedure under rigorous scrutiny in Proffitt was declared to be facially constitutional. This, we respectfully submit, is significant. While Gray might suggest that Proffitt was decided solely within the context of constitutional imperatives flowing from Furman v. Georgia [citation omitted], we opine that this Court is bound to have kept in mind the Due Process concerns of Winship. We strongly disagree with petitioner that ". . . the prior decisions of this Court point ineluctably to the constitutional imperative of a reasonable doubt standard. . ." (Gray's petition at p. 7) If this is true, why did this Court conclude in Proffitt that "[t]he directions given [to the sentencer] by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones?" Proffitt succinctly declared as constitutional on its face a capital sentencing procedure virtually identical to the one adopted by Mississippi, including its weighing of aggravating and mitigating circumstances.

Petitioner declines to confront the distinction between the proof of facts at sentencing and the weighing of facts at sentencing. While the existence of an aggravating circumstance is a fact susceptible in Mississippi law to a reasonable doubt standard, the weighing of established facts (i.e., aggravating factors) against proffered facts (i.e., mitigating factors) is not a process susceptible to proof by either party. Stated differently, the weighing process does not involve any truth-finding. Any suggestion to the contrary is simply based on a misunderstanding of that process.

The Fifth Circuit Court of Appeals decided this question correctly after giving it full consideration. Its views are wholly consistent with those expressed by the Eleventh Circuit in Ford v. Strickland, 676 F.2d 434, 441-42 (5 Cir. 1982) reh'g en banc,

696 F.2d 804, 817-19 (5 Cir. 1983). Moreover, the Ninth Circuit, in Harris v. Pulley, 692 F.2d 1189 (9 Cir. 1982), recently addressed the contention that the State of California must prove beyond a reasonable doubt that the death penalty is appropriate. In dismissing this claim, the Court of Appeals echoed our present sentiments. We quote:

> The United States Supreme Court has never stated that a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed. In Proffitt v. Florida, the Court upheld a statute that did not require this standard when the jury rendered an advisory verdict on whether the death penalty should be imposed. See Proffitt v. Florida, 428 U.S. at 257-58, 96 S.Ct. at 2969 (plurality opinion). Although the jury's verdict in this statute is mandatory, we do not think that this difference makes this statute distinguishable from the one in Proffitt. Moreover, we are not aware of any instance where the state must carry such a burden of proof when attempting to convince a sentencing authority of the appropriate criminal sentence. If the Supreme Court had intended for the burden in death-penalty cases to vary from the standard burden in all other criminal sentencing, it would have said so in one of the many modern cases dealing with the death penalty.
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> 692 F.2d at p. 1195 [emphasis ours].[5/]

Petitioner seeks added mileage out of this Court's recognition in prior decisions that the penalty of death is qualitatively different from any other penalty and requires "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (Gray's petition at p. 8.) Stretched to its breaking point, this language has become the battlecry for many death penalty defendants. They, like Gray, vigorously advocate that every conceivable procedural safeguard must be built into a capital sentencing scheme if it is to withstand constitutional scrutiny. We seriously doubt this Court intended for the individual states to grapple with such an onerous task. A defendant is not entitled to absolute perfection but to basic and fundamental fairness.

5/ This Court recently granted certiorari in Pulley v. Harris, Cause Number 82-1095, in the wake of a petition therefor filed by the State of California. We understand that review has been limited to a question involving proportionality review.

Petitioner suggests that because the states are not in complete harmony on the question, this Court should make explicit that which he finds implicit. Respondents see no compelling need for national uniformity in this area. It is clear from prior decisions of this Court that a state may ". . . regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of [the] people as to be ranked as fundamental." Synder v. Massachusetts, 291 U.S. 97, 105 (1934). Stated differently, a state's ". . . procedure does not run foul of the Fourteenth Amendment because another method may seem . . . fairer or wiser or . . . give a surer promise of protection to [a] prisoner . . ." Id, 291 U.S. at p. 105.

Summarizing these points, we submit that certiorari should be denied because: [1] the standard, if any, for weighing aggravating against mitigating circumstances is a matter peculiar to state law and not federal constitutional law; [2] the Court of Appeals for the Fifth Circuit gave this issue full consideration and decided it correctly; [3] not one whit of confusion presently exists as to the state of the law in this area; rather, the Fifth, Ninth, and Eleventh Circuits are in complete unanimity, and a great majority of the individual states do not require application of a reasonable doubt standard to the process of weighing aggravating against mitigating circumstances; [4] Proffitt v. Florida succinctly held that an identical statute was sufficiently clear and precise to enable the various aggravating factors to be weighed against the mitigating ones; [5] the natural and practical effect of any new rule at this belated hour would precipitate chaos and confusion and would undermine the constitutional integrity of a multitude of state capital sentencing procedures; and [6] the result reached by the state trial and appellate courts, as well as that judiciously reached in the federal arena, was fundamentally fair.

II.

CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO VIABLE REASON FOR THIS COURT TO DEPART FROM ITS PAST PRACTICE OF RELEGATING TO THE LOWER STATE AND FEDERAL COURTS THE TASK OF FORMULATING A TEST OF EFFECTIVE REPRESENTATION THAT IS CONSISTENT WITH THE DEMANDS OF THE SIXTH AMENDMENT.

The second question posed by petitioner tracks the same general theme as his first inquiry, viz., although the game itself is basically the same, all the ground rules are different.[6/] It would be imprudent for the Justices of this Court to exercise their discretion in favor of hearing and deciding this issue because, aside from hinting at a broad and general test in its prior decisions, the Court, historically and traditionally, has left the matter of formulating a test of effective representation by counsel to the lower courts. Petitioner's suggestion that because the penalty of death is different from all other punishments this difference requires a need for more effective lawyers in cases where the defendant is on trial for his life is not a compelling reason for departing from past practice and palpable precedent. Additional reasons for denying full consideration of this question are proffered as follows:

[1] Correct Adherence to Established Precedent. The Court of Appeals correctly adhered to its established precedent that ". . . while attorneys are not held to a higher standard in capital cases, the severity of the charge is part of the 'totality of circumstances in the entire record' that must be considered in the

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6/ There is no direct support for this theme in the Sixth Amendment arena. See Cuyler v. Sullivan, 446 U.S. 335 (1980)[The right to effective assistance of counsel guaranteed by the Sixth Amendment is the same whether counsel is appointed or retained]. Accordingly, it is clear that the standards do not vary according to whether trial counsel is appointed or retained. Why then should they vary according to the severity of the permissible punishment? See also Bass v. Estelle, 696 F.2d 1154 (5 Cir. 1983)[Standard of review for capital cases is the same as for noncapital cases].

effective assistance calculus." Gray v. Lucas, supra, 677 F.2d at p. 1092. Accord: Washington v. Strickland, 693 F.2d 1243 (5 Cir. Unit B, 1982), n. 12 at p. 1250 (en banc); Washington v. Watkins, 655 F.2d 1346, 1356-57 (5 Cir. 1981). The application to petitioner's case of the familiar Fifth Circuit criterion[7/] was fundamentally fair, and the right result was reached.

[2] Near Unanimity on Question of Constitutional Effectiveness. This issue is not one of extreme national importance because there is little, if any, incongruity in the federal arena with respect to Sixth Amendment effectiveness. All of the various circuits, save for the second circuit, now follow one variation or the other of the reasonably effective standard. To this extent there is unanimity on the question of constitutional effectiveness. The resolution of petitioner's Sixth Amendment claim by the Court of Appeals raises no issue of particular significance because it was only necessary to apply the familiar Fifth Circuit criterion to the facts in petitioner's case.

[3] No Conflict with Prior Decisions of this Court. The decision of the Court of Appeals does not in any way conflict with the prior death penalty decisions of this Court. Those cases were not decided in the context of the Sixth Amendment; rather they addressed Eighth and Fourteenth Amendment scenarios. The target of the predecessor decisions was either a state statute or a state trial judge, not the failings and shortcomings of state trial counsel.[8/] While Woodson, Lockett, and Eddings [citations omitted] held that the Eighth and Fourteenth Amendments require a defendant to have the opportunity to present any evidence in mitigation, there is no way to draw from those cases a corresponding Sixth

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7/ "[N]ot errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Gray v. Lucas, 677 F.2d 1086, 1092 (5 Cir. 1982), quoting from Herring v. Estelle, 491 F.2d 125, 127 (5 Cir. 1974).

8/ Stated differently, the decisions of this Court deal with "procedural flaw[s] in the system of justice," not with alleged flaws in the judgment of counsel. Washington v. Watkins, 655 F.2d 1346, 1356 (5 Cir. 1981).

Amendment duty that would require defense counsel to search out and present character evidence in every capital case. To the contrary, ". . . the posture of a given case may well justify, if not require, an effective attorney to refrain from presenting such evidence." Stanley v. Zant, 697 F.2d 955, 961 (11 Cir. 1983).

The four (4) "dubious principles" purportedly in conflict with the mere "tenor" of this Court's pronouncements (Gray's petition at pp. 15-16) are neither "dubious" nor "conflicting." First, the Court of Appeals did not retreat from its established rule that ". . . adequate investigation is a requisite of effective assistance." Gray v. Lucas, supra, 677 F.2d at p. 1093. It fully recognized that trial counsel's duty to investigate is not negated or eliminated by his client's refusal to disclose, even after appropriate inquiry, the names of potentially helpful or important witnesses in mitigation. Rather, the Court found — properly and logically so — that the scope of counsel's duty to investigate was simply "limited" by Gray's refusal. See Akridge v. Hopper, 545 F.2d 457, 458-59 (5 Cir. 1977) cert. denied, 431 U.S. 941 (1977).

Second, we find no suggestion in Lockett, Gregg, Proffitt, Eddings, or Jurek [citations omitted] that trial counsel's failure to conduct an independent investigation into the availability of potentially helpful witnesses constitutes ineffectiveness per se in a death penalty case. As noted by the Eleventh Circuit in Stanley v. Zant, supra, 697 F.2d at pp. 960-61, "[t]hese cases establish that, subject only to the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense. * * * Acknowledgment of the importance of character testimony and the right to have it considered by the sentencing body when presented does not of itself speak to the duty of counsel."

Moreover, respondent simply disagrees with petitioner that the Court of Appeals assumed that in every death penalty case ". . . mitigation and character witnesses are not crucial to a reliable determination of who shall live or die. . ." (Gray's petition at p. 16) Whether or not witnesses in mitigation are indeed "crucial"

must necessarily hinge, under the totality approach to ineffectiveness claims, on the unique facts of each case. The Court of Appeals found that character witnesses were not crucial to the defense asserted in Gray's case. This is a far cry from a definitive finding they are never crucial in any case.

Third, we disagree with petitioner that the analysis of the Court of Appeals ". . . indicates that an informed tactical decision as to strategy can precede, and even negate, counsel's responsibility to conduct an independent and adequate investigation." (Gray's petition at p. 16) In Stanley v. Zant, supra, 697 F.2d at p. 965, the Eleventh Circuit found that Williams v. Maggio, 679 F.2d 381 (5 Cir. 1982) (en banc), and Gray v. Lucas, 677 F.2d 1086 (5 Cir. 1982), support the idea that "[h]aving conducted a sufficient investigation, counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation." The Court in Stanley made the following observations:

> The attorneys in both Williams and Gray had conducted constitutionally sufficient investigations into the possibility of mitigation. The courts in both cases were thus understandably reluctant to second-guess the attorney's tactical decisions. This is no more than a specific application of the general principle that when an attorney makes an informed choice between alternatives, his tactical judgment will almost never be overturned on habeas corpus.
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> 697 F.2d at p. 966.

See also: Washington v. Strickland, supra, 693 F.2d at p. 1255 (5 Cir. Unit B 1982) (en banc).

Finally, the Court of Appeals tailored its test for prejudice to Sixth Amendment breaches where ". . . a defendant alleges that his counsel's failure to investigate prevented his counsel from making an informed tactical choice. . ." Gray v. Lucas, supra, 677 F.2d at p. 1093. This test is not inconsistent with United States v. Morrison, 449 U.S. 361 (1981), which did not, by any stretch of one's vivid imagination, undertake to articulate, or even suggest, a viable test for demonstrable prejudice. Morrison simply teaches that a rule of per se prejudice is not the proper

medication for benign and superficial maladies and that the remedy for a violation of a defendant's right to adequate assistance of counsel should be tailored to the harm caused by that violation.

Nor does this test for prejudice appear to conflict with the en banc decision penned by the Court of Appeals in Washington v. Strickland, supra, 693 F.2d 1243 (5 Cir. Unit B, 1982).[9/] In Gray's case the Court of Appeals opined that "[t]he determination of whether a defendant has been prejudiced varies of course with each breach alleged." The test articulated in Gray addresses a narrow and particular breach, viz. when ". . . a defendant alleges that his counsel's failure to investigate prevented his counsel from making an informed tactical choice. . ." 677 F.2d at p. 1093. The test in Strickland, on the other hand, appears to address, not a particular breach, but overall performance in the entire effective assistance calculus.

Nevertheless, we reach for an alternative arrow contained in our constitutional quiver. The Court of Appeals found in Gray that "[t]o establish a constitutional violation, a defendant must show both a failure to investigate adequately and prejudice arising from that failure." 677 F.2d at p. 1093. The absence of prejudice was not the sole and primary basis for the result reached by the Court of Appeals which also found that". . . the investigation undertaken [by Wright and Heidelberg] was [constitutionally] adequate." 677 F.2d at p. 1093. Accordingly, this state of affairs detracts from the validity of petitioner's plea espousing a compelling need to resolve a conflict, if any. Obviously, there was an independent basis for the result reached by the Court of Appeals. Stated differently, trial counsel were found to be constitutionally

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9/ The State of Florida fully intends to petition this Court for a writ of certiorari in the Strickland case to consider, inter alia, the question "[w]hether the Court of Appeals in expressly overruling the Supreme Court of Florida and expressly rejecting the en banc opinion of another Court of Appeals, has applied the correct standard for review of claims of ineffective assistance of counsel."

effective. It was not necessary, therefore, to determine the prejudicial effect that may have resulted from their alleged errors.

[4] Ripeness of Plenary Review. Ripeness is a legitimate factor submitted for consideration on the question of plenary review. As stated previously, this Court has heretofore declined the invitation to formulate a precise standard of effectiveness in cases less than capital and has relegated to the lower courts the task of defining more specifically the standard of adequate representation by counsel.

It would be imprudent for the Court at this time to formulate or suggest a uniform Sixth Amendment standard unique to captial cases because it has yet to formulate a uniform standard for cases less than capital. We see no necessity for the Justices to provide a workable set of uniform and heightened standards governing trial counsel's investigation and preparation in death penalty cases when they have declined in the past to formulate the normal Sixth Amendment standard. Indeed, it would be impractical, if not impossible, to formulate a workable heightened standard when there has been no prior formulation of the workable norm. This Court should decline petitioner's invitation to put the proverbial cart ahead of the proverbial ox.

[5] Natural and Practical Effects of Contrary Results. The natural and practical effects of a result other than the one reached by the Court of Appeals would absolutely be devastating. A rule that a higher standard of effectiveness is required in capital cases would be tantamount to a rule that the legal standards for constitutionally adequate assistance of counsel vary according to the severity of the permissible punishment. A defendant charged with a misdemeanor would have to be satisfied with a less effective lawyer than one accused of a felony. The defendant charged with murder would be entitled to a more effective lawyer than a defendant charged with manslaughter. Where would one draw the line on this sliding scale of effectiveness?

The Fifth Circuit envisioned these anomalies in Washington v. Watkins, 655 F.2d 1346, 1357 (5 Cir. 1981). We quote:

> [W]ashington has not cited, and our own research has not revealed, any case in which the legal standards for constitutionally adequate assistance of counsel have been held to vary according to the severity of the punishment imposed upon the defendant. We refuse to so hold today.[18]

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18. Innumerable practical problems would be presented by such a holding. For example, since effective assistance is not judged by hindsight, the heightened standard would have to apply to all cases in which a capital offense was charged, regardless of whether the jury subsequently convicted the defendant of a noncapital offense or refused to impose the death penalty in a capital case. Recognition of a "sliding scale" for this constitutional standard would also suggest, for example, that a defendant charged with aggravated assault would be entitled to a more effective lawyer than one charged with simple assault or public intoxication. We decline to embark on such a treacherous path.

655 F.2d at p. 1357.

Another reasonably foreseeable effect of any contrary result reached by the Court at this belated hour would be the generation of countless post-conviction lawsuits by death penalty defendants whose cases on review did not receive the benefit of a heightened Sixth Amendment standard of effectiveness. It is likely that each case with its own unique set of evidentiary facts would have to be re-examined in the light of the heightened standard. Moreover, a heightened standard would encourage a vast majority of future capital defendants to vigorously assail the effectiveness of their trial lawyers. A rule of law that encourages protracted litigation is an impediment rather than an aid to the orderly administration of criminal justice.

[6] Invitation to Factual Quagmire. Ineffective assistance cases in general, and cases turning on the need for character witnesses in particular, are extremely fact specific. Since every case involving a constitutional claim of ineffective assistance of counsel turns on the totality of the facts in the entire record and

the conduct of the attorneys involved, this Court might well find itself entertaining a factual quagmire rather than addressing a straight issue of law.

[7] Petitioner Suggests No Workable Standard. Although petitioner laments that a higher standard under the Sixth Amendment is required in capital cases, he has never suggested what that standard should be. In our opinion, this state of affairs detracts from the validity of his suggestion that a heightened standard is a constitutional necessity.

[8] Severity of Sentence a Part of Totality. Under the Fifth Circuit criterion, the severity of the sentence imposed is not altogether ignored in assessing the effectiveness of state trial counsel. Rather, the seriousness of the charge and the severity of the sentence flowing in its wake " . . . is part of the 'totality of circumstances in the entire record' that must be considered in the effective assistance calculus." Gray v. Lucas, supra, 677 F.2d at p. 1092.

In Washington v. Watkins, supra, the Court of Appeals penned this language that we contend is entirely consistent with the demands of the Sixth Amendment:

> This is not to say, however, that the severity of the sentence faced by a criminal defendant is not a fact to be considered in the overall determination of whether counsel has been constitutionally adequate in a given case. While neither in capital nor noncapital cases is a defendant entitled to perfect or error-free representation, the number, nature, and seriousness of the charges against the defendant are all part of the "totality of circumstances in the entire record" that must be considered in the effective assistance calculus, just as are the strength of the prosecution's case and the strength and complexity of the defendant's possible defenses. Nonetheless, while the facts that must be considered will differ in each and every case, the legal standards for constitutionally effective assistance of counsel are constant.
>
> 655 F.2d at p. 1357.

While the severity of the permissible punishment does not affect the legal standards for constitutional effectiveness, it is a part of the "totality" approach utilized by the Fifth Circuit in analyzing Sixth Amendment claims. Accord: Washington v. Strickland, supra, 693 Fed.2d at p. 1250, n. 12 (en banc).

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONER FAILED TO PROPERLY RAISE AND PRESERVE ANY CLAIM CONCERNING THE PROSECUTION'S INTERJECTION AT SENTENCING OF THE NON-STATUTORY AGGRAVATING CIRCUMSTANCE OF PETITIONER'S FUTURE DANGEROUSNESS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The third question posed by petitioner is not cert-worthy because it was not raised in the State Courts, the District Court, or in the Court of Appeals. The record reveals that petitioner did raise a substantive Estelle v. Smith[10/] claim. However, the point was not pursued at the evidentiary hearing in the District Court or addressed in post-hearing memoranda. Consequently, the Court of Appeals deemed such as waived [677 F.2d 1086, 1101-2]

During the sentencing phase of petitioner's trial, the State called Charlton S. Stanley, Ph.D. to testify concerning his examination and diagnosis of petitioner to rebut the conclusions reached in the MMPI introduced by the defense. Dr. Stanley had examined peitioner at the Mississippi State Hospital at Whitfield as a result of two separate commitment orders entered during the course of the original proceedings.

In the course of his testimony on direct examination, Dr. Stanley testified that he diagnosed petitioner as having a passive/aggressive personality disorder meaning that "he has a personality which [is] basically a hostile one and aggressive personality." [State Trial Transcript 604] He further testified that in his opinion the petitioner was sane and without psychosis.

In this context the following colloquy occurred:

> Q. Now, in regard to this hostile personality, Doctor, if in the future, he gets mad at somebody, will he repeat the act of murder?
>
> A. The best statistics psychologically, where psychological research shows, is that the best prediction of future behavior is to look at past behavior. And, I would suggest that, you know, looking at past behavior worth, the personality profile that he shows, I would have to answer yes.--That the chances are better than average, very good, as a matter of fact.
>
> [State Trial Transcript 606]

10/ Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981).

No objection was interposed to the question or answer, and no objection was interposed to the District Attorney's comments regarding the same in closing argument. (See excerpt noted on p. 33 of Petition for Writ of Certiorari.) Neither of these incidents were assigned as error on direct appeal.[11/]

Petitioner first challenged this testimony in a post-conviction petition for a writ of error coram nobis. However, the claim was couched not in terms of Barclay v. Florida, supra, but in terms of Estelle v. Smith, supra. The Mississippi Supreme Court denied the petition without opinion, and virtually an identical petition, only this time for a writ of habeas corpus, was filed in the District Court.

Collaterally, petitioner raised in both his State and Federal petitions questions of effective assistance of counsel alleging among other grounds inadequate pre-trial investigation and the stipulation to the introduction of Dr. Stanley's testimony.

An evidentiary hearing was conducted by the District Court and petitioner introduced evidence in support of two claims; i.e., ineffective assistance of counsel and Witherspoon v. Illinois.[12/]

Post-hearing memoranda were requested, and petitioner in addition to briefing the two areas covered during the hearing addressed six other claims. These were:

1. That the capital statutory scheme in Mississippi on its face violates the Eighth and Fourteenth Amendments;

2. That petitioner's rights under the Fifth, Sixth and Fourteenth Amendments were violated by the introduction of several statements given by the petitioner to the police officers that were not freely and voluntarily given;

3. That the method of jury selection used in Mississippi violated petitioner's Sixth and Fourteenth Amendment rights;

4. That petitioner was denied his rights under the Fourteenth Amendment when the jury was not permitted to consider guilt of lesser included offenses;

11/ Unlike Barclay there was not a non-statutory aggravating circumstance found by the jury.

12/ Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968).

5. That the method of review adopted by the Mississippi Supreme Court deprived petitioner of his rights under the Eighth and Fourteenth Amendments, and

6. That the Mississippi Supreme Court has adopted an impermissably restrictive method of comparative review of death sentences.

In his appeal from the denial of the writ, the petitioner assigned as error the failure of the District Court to address all of the claims, including his Estelle v. Smith claim, raised in the petition. In affirming the decision of the lower court the Court of Appeals held:

> With respect to the third category of claims, those which were raised in Gray's habeas petition but neither pursued nor pressed before the district court, we find that the district court did not need to address those claims. See Harper v. Merckle, 638 F.2d 848, 855 (5th Cir. 1981); Corenswet, Inc. v. Amana Refrigeration, 594 F.2d 129, 139 (5th Cir. 1979); accord Bast v. Department of Justice, 665 F.2d 1251 (D.C. Cir. 1981); Stanspec Corp. v. Jelco, Inc., 464 F.2d 1184, 1187 (10th Cir. 1972); King v. Stevenson, 445 F.2d 565, 570-71 (7th Cir. 1971); Ark-Tenn Distributing Corp. v. Breidt, 209 F.2d 359, 361 (3d Cir. 1954).
>
> Sound reasons exist for the application of this rule. Our adversary system of justice depends in large part on "that concrete adverseness which sharpens the presentation of issues" and illuminates the disposition of difficult claims. Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). By raising a claim in the pleadings but failing to pursue it any further, a litigant fails to apprise the court fully of the legal and factual under pinnings of his claims. Instead of having issues clarified during the course of a trial by hearings, arguments or memoranda, the district court is left to divine the legal and factual bases of a claim on its own. This deprives the court of the benefits the adversary system was designed to confer. Moreover, when a party fails to press his claims, a district court is left in doubt as to whether any live controversy remains on that point. While a party must of course raise his claims in the pleadings, the pleadings only mark the beginning of a lawsuit. Having plead his claims correctly, a litigant may not abandon any further pursuit of his claims and then complain because the district court failed to address his contentions.
>
> The requirement that a litigant must pursue as well as raise his claims is particularly appropriate in light of our holding in Strickland. The burden which Strickland places on the district

> court to address each claim raised in a habeas petition puts a concomitant duty on counsel to give the court a full development of every claim he does not waive. We note also that raising multiple undeveloped claims gives rise to the possibility of using pleadings for delay. Without attributing any such motive to Gray's counsel, we note that such a tactic may be appealing in death penalty cases where delay may be a defendant's main hope.
>
> By requiring a party to pursue his claims actively, the issues are clarified and can be resolved by the district court with greater skill and speed. Adequate development of the issues also allows the district court to identify frivolous claims more easily and remove them from consideration. To the extent that attorneys are discouraged from filing frivolous claims, the habeas petitioner himself is aided since both the court and the petitioner's attorney are able to focus on those claims which merit the most attention. We thus find that those claims which Gray raised in his petition for habeas corpus but never pressed or presented again to the district court were abandoned.
>
> 677 F.2d at 1102.

Only after all of the preceding had transpired did Gray in his petition for rehearing first raise the specter of a Barclay-type challenge to the testimony of Dr. Stanley. Specific note, however, should be made of the fact that the challenge was couched not in the substantive terms now alleged but in terms of a Sixth Amendment denial of effective assistance of counsel. [See Petition for Rehearing pp. 6-8.]

[1] The rule is now well settled that this Court will decline to entertain a claim in a petition for a writ of certiorari that was neither raised in the State courts, in the district court or in the court of appeals. Mabry v. Klimas, 448 U.S. 444, 65 L.Ed.2d 894, 100 S.Ct. 2755 (1980); Jenkins v. Anderson, 447 U.S. 231, 65 L.Ed.2d 86, 100 S.Ct. 2124 (1980). See also United States v. Santana, 427 U.S. 38, 49 L.Ed.2d 300, 96 S.Ct. 2406 (1976); United States v. Ramsey, 431 U.S. 606, 52 L.Ed.2d 617, 97 S.Ct. 1972 (1977); Dorsynski v. United States, 418 U.S. 424, 41 L.Ed.2d 855, 94 S.Ct. 3042 (1974); Anderson v. United States, 417 U.S. 211, 41 L.Ed.2d 20, 94 S.Ct. 2253 (1974). Accord Delta Air lines, Inc.

v. August, 450 U.S. 346, 67 L.Ed.2d 281, 101 S.Ct. 1146 (1981); Dothard v. Rawlinson, 433 U.S. 321, 53 L.Ed.2d 786, 97 S.Ct. 2720 (1977); Adicks v. Kirss & Co., 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970).

This case is a classic example of the metamorphic changes encountered by the States as prisoners advance from one level to the next in the State/Federal criminal justice system. As indicated supra, the status of Dr. Stanley's testimony has progressed from the point of no objection to waiver to reversible error. Certainly, under no stretch of the imagination could one, other than tongue-in-cheek, contend that the question has been exhausted in the State courts or addressed by the lower Federal courts.

[2] Alternatively, this Court, as well as all other Federal Courts, is barred from considering petitioner's Barclay claims based upon independent State procedural grounds.

In Picard v. Connor, 404 U.S. 270, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971) this Court stated:

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," Ex parte Royall, supra, at 251, 29 L.Ed. at 871, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See Darr v. Burford, supra, at 203, 94 L.Ed. at 766; Davis v. Burke, 179 U.S. 399, 401-403, 45 L.Ed. 249, 250, 251, 21 S.Ct. 210 (1900).
>
> Respondent challenged the validity of his indictment at every stage of the proceedings in the Massachusetts courts. As the Court of Appeals pointed out, 434 F.2d, at 674, this is not a case in which factual allegations were made to the federal courts that were not before the state courts, see, e.g., United States ex rel. Boodie v. Herold, 349 F.2d 372 (CA2 1965); Schiers v. California, 333 F.2d 173 (CA9 1964), nor a case in which an intervening change in federal law cast the legal issue in a fundamentally different light, see, e.g., Blair v. California, 340 F.2d 741 (CA9 1965); Pennsylvania ex rel.

Raymond v. Rundle, 339 F.2d 598 (CA3 1964). We therefore put aside consideration of those types of cases. The question here is simply whether, on the record and argument before it, the Massachusetts Supreme Judicial Court had a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction. We think not.

Until he reached this Court, respondent never contended that the method by which he was brought to trial denied him equal protection of the laws. Rather, from the outset respondent consistently argued that he had been improperly indicted under Massachusetts law and, to the extent he raised a federal constitutional claim at all, that the indictment procedure employed in his case could not be approved without reference to whether the Fifth Amendment's requirement of a grand jury indictment applied to the States. He adverted to the Fourteenth Amendment solely as it bore upon that submission. The equal protection issue entered this case only because the Court of Appeals injected it.

Id., at 275-277, 30 L.Ed.2d at 443-44.

See Also Anderson v. Harless, ___U.S.___, 74 L.Ed.2d 3, 103 S.Ct. 276 (1982).

Petitioner, however, has no State remedies to exhaust. In Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1570 n. 28, 71 L.Ed.2d 783 (1983), this Court held:

As we recognized in Sykes, 433 U.S., at 78-79, 97 S.Ct., at 2502, the problem of waiver is separate from the question whether a state prisoner has exhausted state remedies. Section 2254(b) requires habeas applicants to exhaust those remedies "available in the courts of the State." This requirement, however, refers only to remedies still available at the time of the federal petition. See Humphrey v. Cady, 405 U.S. 504, 516, 92 S.Ct. 1048, 1055, 31 L.Ed.2d 394 (1972); Fay v. Nola, 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (163). Respondents, of course, long ago completed their direct appeals. Ohio, moreover, provides only limited collateral review of convictions; prisoners may not raise claims that could have been litigated before judgment or on direct appeal. See Ohio Rev.Code Ann. § 2953.21(A) (1975); Collins v. Perini, 594 F.2d 592 (CA6 1979); Keener v. Ridenour, 594 F.2d 581 (CA6 1979). Since respondents could have challenged the constitutionality of Ohio's traditional self-defense instruction at trial or on direct appeal, we agree with the lower courts that state collateral relief is unavailable to respondents and, therefore, that they have exhausted their state remedies with respect to this claim.

In Mississippi post-conviction relief on non-jurisdictional matters can only be obtained by way of a writ of error coram nobis. See Miss. Code Anno. § 99-35-145 (1972).

In the recent case of Callahan v. State, Miss. Sup. Ct. Misc. Docket No. 1445 (Opinion not yet published, Feb. 16, 1983), the Mississippi Supreme Court commented upon successive claims grounded upon factual questions which have already been determined.

> We first address the petition for writ of error coram nobis by recognizing a basic premise in this jurisdiction that such post-conviction petitions are limited in nature. Justice Ethridge, in the case of In re Broom's Petition, 251 Miss. 25, 168 So.2d 44 (1964), set forth the circumstances in which a writ for error coram nobis would lie. His opinion states:
>
> > The general scope of a petition for writ of error coram nobis, or motion in the nature thereof, is to bring before a court a judgment previously rendered by it, for the purpose of review or modification. There must be some error of fact and not of law affecting substantially the validity and regularity of the proceedings, which was not brought into issue at the trial. Such motion or petition is an extraordinary and residual remedy to correct or vacate a judgment on facts or grounds not appearing on the face of the record, not available by appeal or otherwise, and not discovered until after rendition of the judgment, without fault of the party seeking releif. It is an attack on a judgment of conviction, valid on its face, that defective by reason of facts outside the record, which deprived accused without fault on his part of the constitutional right to a fair trial. [Emphasis added]. [251 Miss. at 32-33, 168 So. 2d at 48].
>
> With this background in mind, our Court has since ruled that the writ of error coram nobis will not be allowed to relitigate questions of law or fact already decided by this Court. Auman v. State, 285 So.2d 146 (Miss. 1973). Moreover, "a defendant in a criminal trial may not deliberately hold back matters known to him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again." Holloway v. State, 261 So.2d 799, 800 (Miss. 1972).

See also Edwards v. State, Miss. Sup. Ct. Docket No. 53,298 (Opinion not yet reported, March 23, 1983)(Court held that question of law concerning inflammatory comments of District Attorney were barred from review in post-conviction petition where question based on same had been raised on direct appeal in the context of effective assistance of counsel.)

Consequently, since petitioner couched his claims concerning Dr. Stanley's testimony in terms of Estelle v. Smith, supra, he is now estopped under State law from recasting the same arguement in terms of Barclay.

In summary, we submit that certiorari should be denied for two reasons. [1] This Court has made it abundantly clear that it will not entertain claims which have not been exhausted in the State courts or addressed by the lower Federal courts. [2] Since petitioner initially raised his objection to Dr. Stanley's testimony in terms of Estelle v. Smith, supra, he is barred under State law from relitigating the same factual situtation in terms of Barclay v. Florida, supra.

VII. CONCLUSION

The petitioner's contentions pose no question of particular moment or indecision in the case law of the land and it is therefore respectfully submitted that the petition for writ of certiorari in all justice should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-6172

JIMMY LEE GRAY,

Petitioner,

VERSUS

EDDIE LUCAS, Warden, and THE ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

In his petition for writ of certiorari, the petitioner, Jimmy Lee Gray, presents three separate questions that merit review in this Court. Petitioner asserts that this Court should grant certiorari (1) to consider whether the Eighth and Fourteenth Amendments require that the reasonable doubt standard be applied in determining whether a death sentence is the appropriate punishment in a particular case, (2) to determine whether the scope and nature of counsel's duty under the Sixth Amendment to investigate and prepare in a capital case is greater than in a noncapital case, and (3) to determine whether the prosecutor's surprise interjection at sentencing of the nonstatutory aggravating circumstance of petitioner's future dangerousness violated the Eighth and Fourteenth Amendments.

Respondents' brief in opposition merits a brief reply with respect to the second and third questions presented for review. The sound considerations supporting the grant of certiorari to review the first question presented have been addressed in the petition. Additionally, petitioner would note that the propriety of the application of the reasonable doubt standard to a capital sentencing proceeding is a question of profound national significance and one that requires careful analysis of the requirements of the Fourteenth Amendment to the Constitution of the United States. Respondents' suggestion that this is a matter appropriately left to haphazard and inconsistent determinations by state courts - when matters of life or death are at stake - is wholly unsupportable.

With respect to the second question presented, the underpinning of the respondents' opposition is that this "court, historically and traditionally, has left the matter of formulating a test of effective representation by counsel to the lower courts." (Opp. at 15). This statement is patently in error, for this Court has recently granted certiorari in a case that raises issues directly relating to the standards for the assessment of allegations of ineffective assistance of counsel in a criminal case.

United States v. Cronic, No. 82-660, cert. grtd, ___ U.S. ___, 51 U.S.L.W. 3611 (February 22, 1983). Surely, the resolution of the questions presented in Cronic will have direct bearing and relevance to the proper disposition of the petitioner's case. However, the present case presents the additional important question of what standards should be applicable to the evaluation of claims of ineffective assistance of counsel in a capital case. Therefore, the present case provides an indispensable companion to Cronic, and is one that should be appropriately considered at the same time. Consequently, the reasons for granting certiorari are even more compelling in the aftermath of the decision to review Cronic.

Indeed, this is fully consistent with the position asserted in respondents' opposition. Respondents' intimate that it would be inappropriate for this Court "to formulate a workable heightened standard when there has been no prior formulation of the workable norm." (Opp. at 20). However, now that the "workable norm," will be articulated, it would be timely, even under respondents' view of the case, to consider the critical question of the scope and nature of counsel's obligations in a capital case. At the very least, the resolution of the appropriateness of certiorari should await this Court's disposition of the questions presented in Cronic.

Finally, in discussing the third question presented, the respondents have neglected the fundamentally unfair result in this case: the court of appeals resolved one of petitioner's federal constitutional challenges by finding, for the first time, that the prosecutor, not the state psychologist, interjected the issue of future dangerousness into the jury's deliberations. Gray v. Lucas, 677 F.2d 1086, 1095-96 (5th Cir. 1982). It makes little sense for respondents to assert that this issue was not previously raised when no previous court, nor the trial record in these proceedings, ever suggested that the prosecutor, rather than the psychologist, had presented the issue of future dangerousness to the jury. After the court of appeals presented its novel

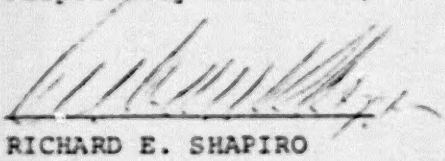
view of the record, petitioner therefore protested, at the first possible instance, that the prosecutorial interjection of non-statutory aggravating circumstances into the sentencing hearing violated the Eighth Amendment. Yet, he was rebuffed on rehearing by the court of appeals.

Surely, the petitioner cannot be faulted for not presenting an issue earlier that was not supported by the record nor suggested by any state or federal court that had reviewed this case. Rather, the issue was fashioned by the court of appeals in response to petitioner's claim of ineffective assistance of counsel. If this issue is not properly before the Court, as respondents' suggest, petitioner submits that fundamental notions of fairness and justice dictate that the case should be remanded to the United States Court of Appeals for the Fifth Circuit to consider an issue on the merits that is the self-created product of the Court's resolution of petitioner's other claims for relief.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, petitioner respectfully requests that his petition be granted.

Respctfully submitted,



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